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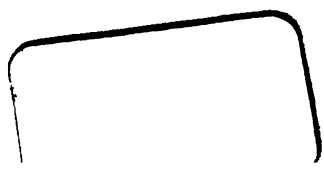
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June 26²⁶
REPORTS OF CASES C

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF OREGON

FRANK A. TURNER
REPORTER

VOLUME 34

DECISIONS RENDERED BETWEEN MAY 25, 1909,
AND NOVEMBER 9, 1909

SALEM, OREGON
WILLIS S. DUNIWAY, STATE PRINTER
1910

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OF THE
SUPREME COURT

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OCT 4 1910

JUDICIAL DISTRICTS AND CIRCUIT JUDGES

IN THE

STATE OF OREGON

June 1, 1909

First Judicial District—

Jackson	{	HIERO K. HANNA.
Josephine		

Second Judicial District—

Coos	{	JOHN S. COKE.
Curry		
Douglas	{	JAMES W. HAMILTON.
Benton		
Lane	{	LAWRENCE T. HARRIS.
Lincoln		

Third Judicial District—

Linn	{	GEORGE H. BURNETT, Department No. 1.
Marion		
Polk		
Tillamook	{	WILLIAM GALLOWAY, Department No. 2.
Yamhill		

Fourth Judicial District—

Multnomah	{	EARL C. BRONAUGH, Department No. 1.
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		CALVIN U. GANTENBEIN, Department No. 4.
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Fifth Judicial District—

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Clatsop		
Columbia	{	JAMES A. EAKIN, Department No. 2.
Washington		

Sixth Judicial District—

Morrow	{	HENRY J. BEAN.
Umatilla		

Seventh Judicial District—

Crook	{	WILLIAM L. BRADSHAW.
Hood River		
Wasco		

Eighth Judicial District—

Baker	{	WILLIAM SMITH.
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Ninth Judicial District—

Grant	{	GEORGE E. DAVIS.
Harney		
Malheur		

Tenth Judicial District—

Union	{	JOHN W. KNOWLES.
Wallowa		

Eleventh Judicial District—

Gilliam	{	ROBERT R. BUTLER.
Sherman		
Wheeler		

Thirteenth Judicial District—

Klamath	{	GEORGE NOLAND.
Lake		

PROSECUTING ATTORNEYS

IN THE STATE OF OREGON

June 1, 1909

First Prosecuting District—

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Josephine

Second Prosecuting District—

Klamath } DELMON V. KUYKENDALL
Lake

Third Prosecuting District—

Oos } GEORGE M. BROWN
Curry }
Douglas

Fourth Prosecuting District—

Benton } EDWIN R. BRYSON
Lane }
Lincoln

Third Judicial District—

Linn } JOHN H. McNARY
Marion }
Polk }
Tillamook }
Yamhill

Fourth Judicial District—

Multnomah GEORGE J. CAMERON

Fifth Judicial District—

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Clackamas }
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Washington

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Umatilla

Seventh Judicial District—

Crook } FRED W. WILSON
Hood River }
Wasco

Eighth Judicial District—

Baker WILLIAM S. LEVENS

Ninth Judicial District—

Grant } JOHN W. McCULLOCH
Harney }
Malheur

Tenth Judicial District—

Union } FRANCIS S. IVANHOE
Wallowa

Eleventh Judicial District—

Gilliam } JAMES E. BURDETT
Sherman }
Wheeler

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IN MEMORIAM

HON. GEORGE H. WILLIAMS

EX-CHIEF JUSTICE OF THIS COURT.

On this 19th day of April, 1910, comes J. C. Moreland, clerk of this court, and at the request of the Multnomah Bar Association presents memoir and resolutions adopted by the Bar Association on the 16th day of April, 1910, at Portland, and asks that the same be spread upon the journal of this court and printed in the next volume of the Oregon Reports, which motion is allowed, and it is ordered that said memoir and resolutions be entered upon the journal of this court and printed in Volume 54 of the Oregon Reports.

George H. Williams was born near New Lebanon, Columbia County, New York, March 26, 1823. Both his father and his mother were of New England stock, and the family was of Welsh extraction on the father's side and English on the mother's. Both of his grandfathers served in the Continental army during the War of the Revolution. He was reared in Onondaga County and received his early education at Pombeiy Hill Academy, New York, working for his tuition. He studied law with Daniel Gott, and in 1844, at the age of 21, was admitted to the bar at Syracuse. Soon afterward he started for the West to seek his fortune as a lawyer. He proceeded by way of the Erie canal to Buffalo and the Ohio canal to Pittsburg, thence down the Ohio River to St. Louis and up the Mississippi to Fort Madison, Iowa. His wealth was the statutes of New York, a few law books, and some bank notes of New York state banks.

In 1847, on the admission of Iowa as a state, he was elected a district judge. As an anti-slavery Democrat, Judge Williams canvassed the state of Iowa for Franklin Pierce, and was elected one of the presidential electors on the Democratic ticket. Shortly after the inauguration of Pierce (March, 1853) he, at 30 years of age, was appointed Chief Justice of Oregon Territory. President Buchanan appointed Judge Williams to succeed himself, but he had left his prospects in Iowa with some reluctance, and now made up his mind that there was also a great future for Oregon. Accordingly he resigned from the bench, and in 1858 entered upon the practice of law in Portland. He was elected a delegate to the State Constitutional Convention and was appointed chairman of the judiciary committee. After the adoption of the constitution by the convention he took the stump, and by his force of argument and eloquence greatly aided in having the free constitution adopted by the State.

He joined in the call for an amalgamation of anti-slavery war Democrats with Republicans, to be called the Union party, and by this transition he entered the Republican party. In 1864 he was elected to the United States Senate, and his ambition was fulfilled. At the expiration of his term as Senator he was appointed Attorney-General of the United States by President Grant.

He was a member of the Joint High Commission which met in Washington to determine how the disputes between Great Britain and the United States should be settled, namely: The northern boundary through Puget Sound, and the claims for the depredations of the Confederate cruiser *Alabama*.

He was a leader in the Senate during the impeachment of Andrew Johnson, and was chosen by General Grant and his advisers as one to campaign the South and explain the reconstruction act, the policies of the administration, and to plead for Southern co-operation.

In all the troublous times following the Civil War, the responsibility of enforcing law and order by civil remedies was upon him as Attorney-General. He had to meet the lawlessness of the Ku Klux Klan; he had to decide between two governments in Louisiana, Alabama, and Arkansas—conflicts which he resolved in favor of the Republicans in Louisiana, the Democrats in Arkansas, and by a compromise in Alabama. General Grant sent the name of his Attorney-General to the Senate to be Chief Justice of the United States. Judge Williams eventually insisted on his name being withdrawn. The causes have been variously stated as political animosity in the East, due to his Republican partisanship and activity in the reconstruction work; social antagonism to his second wife, then ambitious to be a leader in Washington society, and opposition to him in Oregon because in the course of his active senatorial career and while holding the office of Attorney-General he had necessarily failed to please everybody. Probably all of these hostilities contributed to a result disgraceful only to those who produced it.

In 1881 Judge Williams returned to Portland, Or., and resumed the practice of law as the head of the firm of Williams, Hill, Durham & Thompson, and in 1887 he dissolved partnership with that firm and became the head of the firm of Williams, Ach & Wood, which, on the retirement of Mr. Ach, became Williams & Wood and later, Williams, Wood & Linthicum, with which firm he continued until the day of his death, though during his two terms as mayor of the City of Portland (1902-1905) he practically retired from the firm because he thought the provisions of the charter of the City of Portland required him so to do. He died at his home in Portland April 4, 1910. It may be said that he slept not to wake again. He married Miss Kate Van Antwerp at Keokuk in 1850 and Mrs. Kate George at Portland in 1867. He left only one descendent, Ellen, a daughter of his first wife, and Mrs. Carl Harbaugh and Theodore Williams, both adopted children.

In all that he did he was clear-sighted with that vision called common sense. He was full of the spirit of justice. As a judge, he was calm, impersonal and impartial, sensible, passionless, and just. As a lawyer, he was forceful, eloquent, sincere, and above all, the justice of a case was never obscured from him by technicalities. He was learned in the law, but his ruling trait was plain, good sense.

The trial of a case was with him an appeal to a higher power, and though he conducted his cause with every right of his side maintained, it was with profound respect for the court and perfect courtesy to opposing counsel. No one who has known him can forget the impressive earnestness with which he addressed a jury. No useless stories or wasted eloquence, but an exhibition of the facts with such earnestness as must carry conviction. He was an orator with an eloquence thrilling and captivating; his imagery poetically beautiful. Witness his addresses in memory of William Pitt Fessenden, Abraham Lincoln, U. S. Grant.

As a politician, he was like Lincoln; shrewd to know the popular feeling and to follow it to the point to where it clashed with his settled convictions, but then, instead of surrendering his principles for political advantage, he opposed his principles against the popular outcry and endeavored to instruct the multitude. He disliked dissension or contention either in public or private life. He would rather yield any personal claim than engage in hostilities. He was an amiable man, of a simple, trustful, childlike nature, and if he had a weakness it was that his own innocence led him to trust those who should not be trusted and to yield to those who were in every way his inferiors.

At 87 he was still youthful in mind, belonging to the present, not to the past. Interested in the problems of the day, and as progressive in thought as a man of 25. He exhibited his own childlike simplicity of character in his fondness for children. Two of his children were adopted, but they could not have been more beloved if they had been children of his own blood.

His life covers the most active part of the history of this country. When it began there were neither railways nor telegraph lines. Travel was by river, canal, and coach. Chicago did not exist. Pittsburg and St. Louis were the western frontier, and all that has gone to the making of the country and of the State of Oregon he has had a conspicuous part.

He has gone from us, and as we review the record he made and the example he has left, we can say that we have lost more than the judge and the jurist; more than the politician and the statesman. We have lost a noble and a good man; therefore, be it

Resolved, that in the death of George H. Williams the nation has lost a valued servant; the state and the city their greatest citizen, and the bar its most eminent and beloved member; and that a copy of this memorial be engrossed and transmitted to the members of his family.

FREDERICK V. HOLMAN,
WILLIAM B. GILBERT,
J. B. CLELAND,
C. J. SCHNABEL,
JOSEPH SIMON,
C. E. S. WOOD,
C. W. FULTON,

Committee.

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ERRATA

Page 51, second line from top, the parenthesis should be between the words "Ala. st" instead of in front of the numerals "106".

Page 210, first line of syllabus 1, "20 Or. 587" shold be "50 Or. 587".

Page 291, line thirteen from bottom, 45 Or. "247" should be "427".

Page 343, the case cited in first line should be "Anderson v. Aupperle."

Page 525, transpose lines twelve and thirteen from top of page.

CASES DECIDED
IN THE
SUPREME COURT
OF
OREGON

Argued March 18, decided May 25, 1909.

BRADFORD v. DURHAM.

[101 Pac. 897.]

**TAXATION—SALE OF LAND FOR TAXES—EXHAUSTION OF PERSONALTY—
DEFECTS INVALIDATING SALE.**

1. Failure of the sheriff to annex to his return of delinquent taxes on lands the affidavit that he can find no goods to satisfy the same, as required by Section 2811, Hill's Ann. Laws 1892, renders the sale and the deed based thereon void.

TAXATION—ASSESSMENT—DESIGNATION OF OWNER.

2. Land should be assessed to the holder of the apparent legal title, as required by Section 3067, B. & C. Comp., and an assessment to one not the owner is void.

TAXATION—ASSESSMENT—DESIGNATION OF OWNER.

3. An assessment of a tract of land at a lump sum to one who owns only a part of it is void.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW.

4. A statute making a tax deed conclusive evidence of the regularity of the tax proceedings is unconstitutional, as depriving the owner of property without due process of law.

TAXATION—TAX TITLES—TAX DEEDS—RECITALS—"SUBSTANTIAL STATEMENT."

5. A tax deed based on an assessment to "Priscilla Durham," which recites that the land was assessed to "Petruella Durham," is not a "substantial" statement of the assessment within the requirements of Section 3127, B. & C. Comp., defining the effect of tax deeds as evidence.

ESCROWS—UNAUTHORIZED DELIVERY.

6. A deed left in escrow, which is improperly delivered by the depository without compliance with a condition requiring payment of the consideration named, passes no title.

From Douglas: JAMES W. HAMILTON, Judge.

Statement by MR. CHIEF JUSTICE MOORE.

This is a suit by W. H. Bradford against Petruella Durham and others, to determine an adverse claim to real property. The complaint states that the plaintiff, W. H. Bradford, is the owner in fee and entitled to the possession of the southwest $\frac{1}{4}$ of the northwest $\frac{1}{4}$, the northwest $\frac{1}{4}$ of the southwest $\frac{1}{4}$, and the south $\frac{1}{2}$ of the south $\frac{1}{2}$ of section 36, in township 23 south of range 3 west of the Willamette Meridian, in Douglas County, which land is unimproved and not in the possession of any person, and that the defendants, Petruella Durham, Wilson H. Stubbings, Samuel Handsaker, and Samuel Hunsaker, claim some right, title, or interest in the premises adverse to the plaintiff, but that such assertion is without right. The prayer is that the defendants be required to set forth the nature of their alleged claim, and that it may be decreed invalid.

The defendant Mrs. Durham and the defendant H. E. Noble, who, by order of the court, was made a party in place of Samuel Handsaker, severally filed answers denying the averments of the complaint, and alleging that each was the owner in fee simple of the real property specified, and entitled to the possession thereof. For a further defense Noble averred that plaintiff's alleged assertion of right to the premises was derived from a pretended sale and conveyance for the payment of delinquent taxes, and that such proceedings were void. The other defendants made default.

After replies had placed in issue the allegation of new matter in the answers, the cause was tried and the suit dismissed, but, as to all the other parties, it was determined that Noble was the owner in fee of the land. From this decree the plaintiff appeals. MODIFIED.

For appellant there was a brief over the names of *Mr. John A. Buchanan* and *Messrs. Veazie & Veazie*,

with oral arguments by *Mr. Buchanan* and *Mr. J. C. Veazie*.

For respondent there was a brief over the names of *Messrs. Coshow & Rice*, with oral arguments by *Mr. Oliver P. Coshow* and *Mr. John M. Gearin*.

Opinion by MR. CHIEF JUSTICE MOORE.

The evidence shows that on September 24, 1894, the State of Oregon executed to the defendant Samuel Handsaker a deed to the land described in the complaint; that at that time he was the agent of Charles Hamlin, for whom he took the legal title in trust, and to whom he soon thereafter conveyed all his interest in the premises, but that the deed to Hamlin was never recorded; that the land was assessed for the year 1895 to Handsaker, but, as the taxes imposed had not been paid, the sheriff on August 3, 1901, sold the premises to Douglas County, which on January 28, 1903, received a tax deed therefor; that, pursuant to an order of the county court, the county judge on March 16, 1903, executed a deed of the land to Frank E. Alley, from whom the plaintiff herein acquired the alleged title by mesne conveyances. In the year 1900 all of section 36, except the southwest $\frac{1}{4}$ of the southwest $\frac{1}{4}$ thereof, in township 23 south of range 3 west of the Willamette Meridian, was assessed to Priscilla Durham, but, the tax thereon not having been paid, the sheriff sold the land February 24, 1902, to Z. L. Dimmick, who assigned all his interest in the purchase to the plaintiff herein. The sheriff on January 30, 1905, executed to the plaintiff a deed of the premises last described, in which instrument it is asserted that the land "was duly assessed for the fiscal year 1900 to Petruella Durham." After this suit was commenced, Handsaker, for the expressed consideration of \$100, signed and acknowledged a quit-claim deed purporting to convey all his interest in the premises described in the complaint to the defendant Noble. This deed was deposited with a bank in Portland, to be delivered upon

the payment of the consideration, and, by paying to Handsaker's son the sum of \$10, Noble secured possession of the deed and caused it to be recorded.

1. It will be seen that the plaintiff's title to the land is based upon two tax deeds, the validity of which depends upon a compliance with the terms of the statute in force when the proceedings were instituted and consummated. In the year 1895, when the land was assessed to Handsaker, and until February 27, 1901, when the law was repealed (Laws 1901, p. 250), the sheriff, to whom was delivered the tax roll with a warrant attached, was required to make out a statement of the taxes remaining unpaid and to annex thereto an affidavit that he had not, upon diligent inquiry, been able to discover any goods or chattels belonging to the persons charged with such unpaid taxes whereon he could levy the same. Such a statement and affidavit was then to be filed with the county clerk. Hill's Ann. Laws 1892, § 2811. A copy of that part of the roll which should contain the sheriff's affidavit shows that he failed to subscribe his name to the written declaration, and neglected to take the required oath. Under the law then operative, the enforced collection of the sum annually imposed on land for the maintenance of the state, county, and municipal government was primarily by a levy on, and a sale of, personal property belonging to the person whose land was charged with the unpaid taxes. A resort to the real estate taxed to satisfy the demand could be had only when the required affidavit was annexed to the sheriff's return, upon the filing of which in the clerk's office a warrant could be attached to the delinquent roll, commanding and authorizing a sale of the land. A compliance with the requirement of the statute, in the particulars indicated, was a condition precedent to the levy on, and sale of, land for the collection of the unpaid taxes, and, as the possession of goods or chattels by the alleged owner of the land is not negatived, the sale of the real property to satisfy

the tax for the year 1895 was a nullity; and the deed executed pursuant to such sale is void. *Hughes v. Linn County*, 37 Or. 111 (60 Pac. 843).

2. It will be remembered that all of section 36 in township 23 south of range 3 west, in Douglas County, except the southwest 40 acres, was assessed for the year 1900 to Priscilla Durham. The description of the entire tract of land so assessed for that year includes all the real property specified in the complaint, except the southwest $\frac{1}{4}$ of the southwest $\frac{1}{4}$ of that section. The evidence discloses that at the time such assessment was made the State of Oregon was the owner of 360 acres of land in section 36 of that township and range, to-wit, the northeast $\frac{1}{4}$, the east $\frac{1}{2}$ of the northwest $\frac{1}{4}$, the northwest $\frac{1}{4}$ of the northwest $\frac{1}{4}$, the northwest $\frac{1}{4}$ of the southeast $\frac{1}{4}$, and the northeast $\frac{1}{4}$ of the southwest $\frac{1}{4}$, but that on December 14, 1903, the State conveyed such land to L. I. Johnsted and A. J. Danson. The statute in force in the year 1900, when the second assessment was made, required the assessor to assess all taxable property within his county, and to return to the county clerk on or before a specified day the assessment roll, with a full and complete assessment of such taxable property entered therein, "including a full and precise description of the lands or lots owned by each person therein named." Section 3057, B. & C. Comp.

3. An examination of the transcript fails to disclose any legal evidence tending to show that Priscilla Durham or the defendant Petruella Durham ever owned any part of the land described in the complaint. The defendant Samuel Handsaker in the year 1900 held the apparent legal title to such real property, and his obvious ownership would have been revealed by a search of the records of deeds of Douglas County. So far as disclosed by the transcript, he was the only person who could legally have been assessed with the land. *Lewis v. Blackburn*, 42 Or. 114 (69 Pac. 1024); *Martin v. White*, 53 Or. 319

(100 Pac. 290). When lands are assessed at a lump sum to a person who owns only a part of the real property described on the roll, he cannot determine the amount of tax he is required to pay, and such assessment is a nullity. *Strode v. Washer*, 17 Or. 50 (16 Pac. 926); *Title Trust Co. v. Aylesworth*, 40 Or. 20 (66 Pac. 276).

4. The statute provides, in effect, that a tax deed shall contain a specification of the property sold, as described in the assessment roll, and shall state to whom the land was assessed, which deed shall be *prima facie* evidence of certain facts and conclusive evidence of other facts; and in all suits involving the title to real property held by virtue of a tax deed, "executed substantially as aforesaid," the person claiming the right of possession adverse to the title conveyed by the tax deed must, in order to defeat such title, prove the invalidity of the tax proceedings. Section 3127, B. & C. Comp. This enactment is invoked to uphold the tax titles in the case at bar. The legislative assembly is powerless to make a tax deed conclusive evidence of the regularity of the tax proceedings, for to sanction such a rule would permit a violation of the fourteenth amendment of the Constitution of the United States, which forbids a state to deprive any person of property without due process of law. *Harris v. Harsch*, 29 Or. 562 (46 Pac. 141).

5. The tax deed, based on the second assessment, was not executed "substantially" as required by the statute; for, while the assessment roll shows that the land was listed as the property of Priscilla Durham, the tax deed falsely asserts that the real property "was duly assessed for the fiscal year 1900 to Petruella Durham." If, therefore, the rule of conclusiveness could be invoked in any case, it would not, for the reason stated, be applicable herein. Both attempts to divest the title to the land by the tax proceedings were ineffectual; and the tax deeds are void.

6. We believe, however, that an error was committed in decreeing that the defendant Noble was the owner of

any part of the land described in the complaint. He holds what purports to be a legal title to the premises which he apparently secured by Handsaker's deed. This instrument was deposited in escrow, to be delivered when the grantee therein named paid \$100, the expressed consideration therefor. He paid on account thereof only \$10, and obtained the deed from Handsaker's son. Noble testified that he presumed the person who secured the deed from the bank and gave it to him had sufficient authority to justify his act. If the right of an agent to act for his principal could be established in such manner, without any evidence of his possessing, in other instances, sufficient power to authorize the delivery of the deed, this presumption is overcome by the testimony of Samuel Handsaker, which shows that he never empowered his son so to act, or ratified his conduct in any manner. There was, in our opinion, no delivery of Handsaker's deed; and, this being so, Noble has no title whatever to the premises. *Tyler v. Cate*, 29 Or. 515 (45 Pac. 800).

The decree will therefore be modified as to the defendant Noble, and the suit dismissed as to all parties; each being required to pay the costs and disbursements which he incurred in both courts. MODIFIED.

Argued March 18, decided May 25, 1909.

WHITE v. BROWN.

[101 Pac. 900.]

CERTIORARI—ASSIGNMENT OF ERRORS—NATURE AND PURPOSE.

1. The statutory demand that errors relied on to set aside or correct the proceedings of an inferior tribunal must be assigned in the petition, for the writ is to advise the court and the adverse party of the particular questions to be considered in determining the merits of the controversy.

JUSTICES OF THE PEACE—PROCEEDINGS TO PROCURE WRIT—SUFFICIENCY OF PETITION.

2. Section 596, B. & C. Comp., provides that the writ of review shall describe with convenient certainty the decision or determination sought to be reviewed, setting forth the errors alleged to have been committed therein. Section 597 requires a petition for a writ of review to state such facts as from an inspection of the averments would primarily show that the inferior court, officer, or tribunal appears to have employed its functions erroneously in the

exercise of judicial authority, or to have exceeded it or his jurisdiction. A petition to review the action of a justice of the peace in vacating a judgment on the ground that he was without jurisdiction set forth docket entries showing that an action to recover money was begun by plaintiff against defendant in a certain justice's district, that the place of trial was thereafter changed to a justice court of a certain other precinct, where, on a specified date, were filed a transcript and original papers consisting of the complaint, answer, reply, motion, and affidavit for a change of venue; that, on a subsequent date the cause was tried in that court, and judgment rendered for plaintiff, and that thereafter the justice of such precinct, on defendant's motion, vacated the judgment on the ground that his court was without jurisdiction of the action, and, in referring to his action, stated that he "erred in vacating and setting aside said judgment" and "exceeded his jurisdiction in making and entering an order vacating and setting aside said judgment," and "that the making and entering of said order is a material injury to a substantial right of the plaintiff." *Held*, that the petition sufficiently assigned the errors complained of.

APPEAL AND ERROR—DECISIONS REVIEWABLE—MOTION TO OPEN JUDGMENT.

8. Where on a writ of review of proceedings of a justice of the peace, the case had been determined by the circuit court, a motion by the defeated party to open the judgment so as to require the justice to make a more complete return to the writ will be treated as a motion for a new trial, denial of which is not reviewable except in case of manifest abuse of discretion.

APPEAL AND ERROR—REVIEW—PRESUMPTIONS—CHANGE OF VENUE IN JUSTICE COURT.

4. As it will be presumed pursuant to Section 788, subd. 15, B. & C. Comp., that official duty has been performed, where it is impossible to say from a transcript on appeal that a precinct was not the proper district for the transfer of a cause in justice court on a change of venue, it will be taken for granted that the justice of such precinct was the person to whom it was properly transferred as the nearest justice pursuant to Section 2215; that the court had jurisdiction of the subject-matter, and that, as the answer was filed, it also had jurisdiction of defendant against whom judgment was rendered.

JUSTICES OF THE PEACE—JUDGMENTS—VACATION.

5. The specifications by Sections 103, 2237, B. & C. Comp., of mistake, inadvertence, surprise, or excusable neglect, as grounds for opening a judgment in a justice's court, excludes all others, and, though pursuant to Section 924 a justice's court is always open for the transaction of business, it is powerless to set aside a valid judgment except for the reasons specified.

From Josephine: **HIERO K. HANNA, Judge.**

Special proceeding in the circuit court by E. H. White to review proceedings in a justice's court in an action by the petitioner against O. S. Brown. An order of the justice's court setting aside the judgment in favor of defendant Brown was annulled, and he appeals.

AFFIRMED.

For appellants there was a brief and an oral argument by Mr. Oliver S. Brown, in *pro. per.*

For respondent there was a brief over the name of *Mr. J. N. Johnston*, with an oral argument by *Mr. Louis E. Bean*.

Opinion by MR. CHIEF JUSTICE MOORE.

This is a special proceeding to review the action of an inferior tribunal. A writ of review was issued, pursuant to a petition therefor, and the return to the writ, which was made to the circuit court for Josephine County, consists only of certified copies of two entries made by a justice of the peace in his docket, which show that an action to recover money was commenced by the plaintiff against the defendant herein in the justice's district of Grants Pass; that the place of trial was thereafter changed to the justice's court of Slate Creek precinct, where on August 16, 1907, were filed the transcript and the original papers in the action, to-wit, the complaint, summons, answer, reply, motion and affidavit for a change of venue; that on October 2, 1907, in the absence of the defendant, the cause was tried in the court to which it was transferred, and judgment was rendered against him for the sum of \$20 and for the disbursements taxed at \$3.55; and that on October 17, 1907, the justice of the peace of Slate Creek precinct, on motion of the defendant, vacated the judgment on the ground that his court was without jurisdiction to try the action. After the return was filed, the defendant moved to quash the writ and to dismiss the proceedings, for the reason that the petition did not state facts sufficient to authorize the granting of the relief invoked. No order, however, appears to have been made disposing of the motion. At the trial in the circuit court the order of the justice of the peace setting aside the judgment was annulled, and the cause remanded, with directions to restore and enforce the judgment as originally rendered. From the latter judgment the defendant appeals to this court, contending that the petition for the writ of review is insufficient, because it

does not set forth the errors alleged to have been committed by the justice of the peace of Slate Creek precinct.

1. The statute regulating the practice in special proceedings contains, *inter alia*, the following provision:

"The writ shall be allowed by the circuit court or judge thereof, or by the county court or judge of the county wherein the decision or determination sought to be reviewed was made, upon the petition of the plaintiff, describing the same with convenient certainty, and setting forth the errors alleged to have been committed therein." Section 596, B. & C. Comp.

The petition initiating the proceedings sets forth the facts, in effect, as detailed in the docket entries mentioned, and, referring to the officer who annulled the original determination, contains the following statements:

"That said justice of the peace erred in vacating and setting aside said judgment, and that said justice of the peace exceeded his jurisdiction and authority in making and entering an order vacating and setting aside said judgment; that the making and entering of said order is a material injury to a substantial right of the plaintiff."

A petition for a writ of review should state such facts as from an inspection of the averments would primarily show that the inferior court, officer, or tribunal appears to have employed such functions erroneously in the exercise of judicial authority or to have exceeded it or his jurisdiction. Section 597, B. & C. Comp. In assigning a reason for requiring the errors alleged to have been committed to be set forth in a petition for a writ of review, which is equivalent to the common-law remedy of *certiorari*, the editors of the Encyclopedia of Pleading and Practice (volume 4, p. 149) make the following observation:

"This must be done in order that the court or the judge sitting at chambers to whom application is made may see that there is *prima facie* good ground for the issuance of the writ."

We believe, however, that the statutory demand that errors relied upon to set aside or correct the proceedings

of an inferior tribunal must be assigned is designed to advise the court and the adverse party of the particular questions to be considered in determining the merits of the controversy. *Southern Oregon Co. v. Coos County*, 30 Or. 250 (47 Pac. 852).

2. An examination of that part of the petition hereinbefore quoted will show that the error alleged to have been committed is the vacating of the judgment, in annulling which it is asserted that the justice of the peace exceeded his jurisdiction, to the injury of a substantial right of the plaintiff. The petition, though not so specific as it might have been, assigns the errors complained of with such certainty as to notify the court and the defendant of the precise inquiry intended to be raised at the trial, and in our opinion the statement of errors is sufficient for that purpose.

3. After the case at bar had been determined by the circuit court, the defendant moved to open the judgment so as to require the justice of the peace to make a more complete return to the writ of review by sending up certified copies of affidavits showing, it is affirmed, that the justice of the Merlin district was nearer than the justice of Slate Creek precinct. No ruling appears to have been made on such motion. The application for the order invoked will be treated as a motion for a new trial, the denial of which is not reviewable, except in cases of an abuse of discretion that is not apparent herein.

4. The statute prescribes that, when a cause is at issue in a justice's court, the venue may be changed upon motion to the nearest justice. Section 2215, B. & C. Comp. It is impossible to say from an inspection of the transcript before us that Slate Creek precinct was not the proper district. It was incumbent upon the justice of the peace of the Grants Pass district to transfer the cause to the nearest justice, and, as it will be presumed that official duty has been regularly performed (Section 788, subd. 15, B. & C. Comp.), we must take it for granted

that the justice of the peace of Slate Creek precinct was the person to whom the cause was properly transferred; that his court had jurisdiction of the subject-matter; and that, as an answer was filed, it also had jurisdiction of the person of the defendant.

5. The statute regulating the practice in inferior tribunals is, so far as involved herein, as follows:

"The rules in justices' courts governing mistakes in pleadings, * * vacating * * judgments for mistake, inadvertence, surprise, or excusable neglect * * shall be as prescribed in the Code of Civil Procedure for actions in courts of record." Section 2237, B. & C. Comp.

That part of the procedure thus referred to, which is applicable to the case at bar, is as follows:

"The court may, * * in its discretion, and upon such terms as may be just, * * at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect." Section 103, B. & C. Comp.

It does not appear from the return to the writ, that the judgment originally given by the justice's court of Slate Creek precinct, was rendered against the defendant in consequence of any of the causes enumerated in the statute; and, as these are the only grounds specified, the mention of them necessarily excludes all others. Though a justice's court is always open for the transaction of business (Section 924, B. & C. Comp.), it is powerless to set aside a valid judgment which it has rendered, except for the reasons specified, which do not exist in the case at bar. *Griffin v. Pitman*, 8 Or. 342; *American B. & L. Ass'n v. Fulton*, 21 Or. 492 (28 Pac. 636); *Meinert v. Harder*, 39 Or. 609 (65 Pac. 1056).

The judgment originally rendered by the justice of the peace, being presumptively valid, was erroneously vacated; and, this being so, the circuit court properly annulled the vacating order. Hence the judgment is affirmed.

AFFIRMED.

Argued March 4, decided April 20, rehearing denied June 1, 1909.

CUNNINGHAM v. KLAMATH LAKE R. CO.

[101 Pac. 213; 101 Pac. 1099.]

CORPORATIONS—VENUE—TRANSITORY ACTIONS.

1. Under Section 55, B. & C. Comp., relating to service of summons, a transitory action against a domestic corporation may be commenced, either in the county where it has its principal place of business, or in the county where the cause of action arose.

CORPORATIONS—FOREIGN CORPORATIONS—ACTIONS—VENUE.

2. In the absence of any statute, a foreign corporation maintaining an agency in Oregon, and doing business therein, is deemed a resident thereof, and subject to the jurisdiction of its courts in matters growing out of contracts made in the State or causes of action arising therein, and service of process may be made in the same manner as in the case of a domestic corporation.

CORPORATIONS—ACTIONS—VENUE.

3. At common law, a corporation may be sued only in the sovereignty creating it.

CORPORATIONS—FOREIGN CORPORATIONS—RIGHT TO DO BUSINESS.

4. A state permitting a foreign corporation to do business within its limits may impose such conditions to the exercise of such authority as may seem reasonably necessary to safeguard the interests of its own citizens.

CORPORATIONS—FOREIGN CORPORATIONS—VENUE—STATUTES.

5. Under Laws 1903, p. 39, requiring every foreign corporation doing business in the State to appoint a resident attorney in fact to accept service of process, etc., an action against a foreign corporation, for a personal injury negligently inflicted in another state, may be brought in the county in which the attorney resides.

CORPORATIONS—AMENDING EXISTING STATUTES—VALIDITY.

6. Laws 1903, p. 39, requiring every foreign corporation doing business in the State to appoint a resident attorney to accept service of summons, etc., but containing no reference to Section 44, B. & C. Comp., relating to the place of trial, or to Section 55, prescribing the person on whom a summons may be served, or to Section 528, limiting the jurisdiction of a court over foreign corporations, amends the enumerated sections by implication only, and the changes in the existing laws made in that manner are not violative of any constitutional inhibition.

STATUTES—IMPLIED REPEALS—ACTS CONSTRUED AS ONE.

7. Repeals by implication will not be upheld unless the repugnancy between the prior and subsequent statute, on the same subject, is so manifest that both acts cannot remain in force, and if a later statute only modifies a prior statute, the two must be construed as one act.

CORPORATIONS—FOREIGN CORPORATIONS—ACTIONS—SERVICE OF PROCESS.

8. Where a foreign corporation, pursuant to the requirement of a statute, appoints an attorney in fact or other representative on whom process shall be served, the statutory method is generally exclusive, and service of summons on any other agent is ineffectual.

CORPORATIONS—FOREIGN CORPORATIONS—ACTIONS—JURISDICTION.

9. The state into which the representatives of a foreign corporation are sent to transact lawful business therein, may by proper legislation make the

corporation liable to its citizens in actions and suits, and the corporation may there be sued on any transitory cause of action, no matter where it arose.

CORPORATIONS—RESIDENCE.

10. A corporation is deemed to be a resident of the state of its creation.

CORPORATIONS—FOREIGN CORPORATIONS—PROCESS.

11. In the absence of any express legislation on the subject, Section 55, subd. 1, B. & O. Comp., relating to the service of summons in actions against private corporations, though intended to be applied to domestic corporations, applies to foreign corporations doing business in the State.

CORPORATIONS—FOREIGN CORPORATIONS—JURISDICTION—STATUTE.

12. The requirement of Laws 1908, p. 89, that a statement giving the location of the principal office of a foreign corporation doing business in the State shall be filed with the Secretary of State, is designed to afford evidence of its doing business in the State, and does not definitely fix the place where actions against it may be maintained.

From Multnomah: EARL C. BRONAUGH, Judge.

This is an action by A. A. Cunningham against the Klamath Lake Railroad Company, to recover damages for a personal injury. From a judgment in favor of plaintiff, defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *Messrs. Williams, Wood & Linthicum*, and *Mr. Isaac D. Hunt*, with oral arguments by *Mr. Stewart B. Linthicum* and *Mr. Hunt*.

For respondent there was a brief and an oral argument by *Mr. James N. Davis*.

Opinion by MR. CHIEF JUSTICE MOORE.

This action was commenced in Multnomah County, Oregon, to recover damages for a personal injury. The complaint states in effect that defendant is a foreign corporation, engaged in business as a common carrier, and that, complying with the laws of this State, it had appointed John W. Alexander of Portland, as its attorney in fact and resident general agent, who was its representative; that on June 19, 1907, the plaintiff, a resident of Portland, was a passenger on one of defendant's trains from Pokegama, Klamath County, Oregon, to Thrall, Siskiyou County, California, and upon arriving at the latter place was injured, and that, owing to the defendant's alleged

negligence, he was damaged in the sum of \$400. The sheriff's return, indorsed upon the summons issued in the case at bar, states that process was personally served on the defendant in Multnomah County by delivering a certified copy thereof, and also a certified copy of the complaint herein to Alexander. The defendant's counsel, appearing specially, moved to set aside such service, on the ground that the court was without jurisdiction of their client, because the action had not been commenced in the proper county. In support of the motion Alexander's affidavit was filed, wherein he states that the defendant, having been incorporated under the laws of California, duly appointed him its attorney in fact and resident agent, by filing with the Secretary of State of Oregon its power of attorney, which stated that the location of the defendant's principal office in Oregon is at Pockegama; that affiant resides at Portland, and, except the business specified in the power of attorney, he has no other official relationship with the corporation; that the defendant neither has an office, nor transacts any business, in Multnomah County; and that the cause of action arose in Siskiyou County, California. The motion was denied. As the defendant declined to plead or answer, the cause was tried as to the damages sustained; and, judgment having been rendered as demanded, the defendant appeals.

1. The question to be considered is: Did the enactment of February 16, 1903 (Laws 1903, p. 39), amend by implication the statutes of this State, so as to obtain jurisdiction of the person of the defendant by a service of the summons upon its attorney in fact and resident general agent in Multnomah County, when the cause of action stated in the complaint arose in California, and the defendant's principal office in Oregon is in Klamath County? The act referred to requires most corporations formed for profit to pay to the Secretary of State certain organization fees, and demands that foreign cor-

porations shall file with that officer a written declaration containing a statement of specified facts. Section 6 of the enactment, so far as involved herein, is as follows:

"Every foreign corporation * * before transacting business within this State, shall file the declaration and pay the entrance fees hereinafter provided, and shall duly execute and acknowledge a power of attorney, and cause the same to be recorded in the office [of] the Secretary of State, which power of attorney shall be irrevocable, except by the substitution of another qualified person for the one mentioned therein as attorney in fact, and such power of attorney shall appoint some person who is a citizen of the United States and a citizen and resident of this State, as attorney in fact for such foreign corporation, * * and such appointment shall be deemed to authorize and empower such attorney to accept service of all writs, process, and summons, requisite or necessary to give complete jurisdiction of any such corporation, * * to any of the courts of this State, * * and shall be deemed to constitute such attorney the authorized agent of such corporation * * upon whom lawful and valid service may be made of all writs, process, and summons in any action, suit, or proceeding commenced by or against any such corporation * * in any court mentioned in this section, and necessary to give such court complete jurisdiction thereof."

A transitory action against a domestic corporation may be commenced, either in the county where it has its principal office or place of business, or in the county where the cause of action arose. Section 55, B. & C. Comp.; *Holgate v. Oregon Pac. Ry. Co.*, 16 Or. 123 (17 Pac. 859); *Bailey v. Malheur Irrigation Co.*, 36 Or. 54 (57 Pac. 910); *Winter v. Union Packing Co.*, 51 Or. 97 (93 Pac. 930).

2. Prior to the enactment of 1903, as hereinbefore quoted, it was ruled that, in the absence of any statute regulating the matter, a foreign corporation maintaining an agency in Oregon, and doing business therein, was to be deemed a resident thereof, and subject to the jurisdiction of its courts in all matters growing out of con-

tracts made in this State, or causes of action arising therein, and that service of process could be made in the same manner as in the case of a domestic corporation. *Aldrich v. Anchor Coal Co.*, 24 Or. 32 (32 Pac. 756: 41 Am. St. Rep. 831); *Farrell v. Oregon Gold Co.*, 31 Or. 463 (49 Pac. 876). The case of *Hildebrand v. United Artisans*, 46 Or. 134 (79 Pac. 347: 114 Am. St. Rep. 852), was decided after the enactment of 1903, to which statute reference has been made; but, as the defendant in that action was a domestic corporation (*Riddle v. Order of Pendo*, 49 Or. 229, 231: 89 Pac. 640), anything said in the opinion is not controlling herein. The same assertion may be made in relation to the case of *Knapp v. Wallace*, 50 Or. 348 (92 Pac. 1054), which was decided after the passage of the act of 1903, requiring the appointment of an attorney in fact. One of the defendants in that suit was the Althouse Mining Company, a foreign corporation; but, as the relief sought was the foreclosure of a real estate mortgage, the suit was local, and could have been brought only in the county in which the land was situated. Section 42, subd. 1, B. & C. Comp.

3. At common law a corporation could be sued only in the sovereignty which imparted vitality to such artificial being. *Aldrich v. Anchor Coal Co.*, 24 Or. 32 (32 Pac. 756: 41 Am. St. Rep. 831). "The doctrine of the exemption of a corporation from suit in a State other than that of its creation," says Mr. Justice FIELD, in *St. Clair v. Cox*, 106 U. S. 350, 355 (1 Sup. Ct. 354, 358: 27 L. Ed. 222), "was the cause of much inconvenience, and often of manifest injustice. The great increase in the number of corporations of late years, and the immense extent of their business, only made this inconvenience and injustice more frequent and marked. Corporations now enter into all the industries of the country. The business of banking, mining, manufacturing, transportation, and insurance is almost entirely carried on by them, and a large portion

of the wealth of the country is in their hands. Incorporated under the laws of one state, they carry on the most extensive operations in other states. To meet and obviate this inconvenience and injustice the legislatures of several states interposed, and provided for service of process on officers and agents of foreign corporations doing business therein. Whilst the theoretical and legal view that the domicile of a corporation is only in the state where it is created was admitted, it was perceived that, when a foreign corporation sent its officers and agents into other states, and opened offices and carried on its business there, it was, in effect, as much represented by them there as in the state of its creation. As it was protected by the laws of those states, allowed to carry on its business within their borders, and to sue in their courts, it seemed only right that it should be held responsible in those courts to obligations and liabilities there incurred."

4. The comity which exists between the several states of the Union permits a corporation organized under the laws of one state to pursue its occupation by agents who maintain places of business in another state; but, as a condition precedent to the exercise of express or implied authority, the latter state may impose such reasonable regulations as may seem necessary to safeguard the interests of its own citizens.

5. The policy thus outlined was adopted by the legislative assembly of Oregon in 1903, when the act under consideration was passed, prescribing the manner of appointing a representative upon whom process should be served, in order that a court of this State might obtain jurisdiction of the person of a foreign corporation, and changing the method which, in the absence of any statute upon the subject, had theretofore prevailed, whereby the service was made as in the case of a domestic corporation. *Aldrich v. Anchor Coal Co.*, 24 Or. 32 (32 Pac. 756: 41 Am. St. Rep. 831). Whether or not jurisdiction can be secured by serving process upon an agent of a foreign

corporation at its principal office or usual place of business in this State, or whether or not a transitory action can be commenced in any county thereof, and the process served on an attorney in fact in another county therein, is unnecessary to determine, for this action was instituted in the county in which the plaintiff and the attorney in fact resided, and the service of the summons upon him was, in our opinion, sufficient to confer jurisdiction of the person of the defendant.

6. The act of 1903 contains no reference to any statutes regulating the place of trial (Section 44, B. & C. Comp.), or prescribing the person upon whom a summons is required to be served (Section 55, B. & C. Comp.), or limiting the jurisdiction of a court over foreign corporations (Section 528, B. & C. Comp.); but, as the enactment in question amends such statutes only by implication, changes in existing laws which are made in that manner are not violative of any constitutional inhibition. *Cooley's Con. Lim.* (7 ed.) 216; *Warren v. Crosby*, 24 Or. 558 (34 Pac. 661).

No error having been committed in refusing to set aside the service of the summons, the judgment is affirmed.

AFFIRMED.

Decided June 1, 1909.

ON PETITION FOR REHEARING.

[101 Pac. 1099.]

Opinion by MR. CHIEF JUSTICE MOORE.

7. It is contended by defendant's counsel in a petition for a rehearing, that the only inconsistency between the act of 1903, relating to the manner of obtaining jurisdiction of the person of a foreign corporation (Laws 1903, p. 39), and the then existing law on that subject, lies in the specification by that act of another person as a representative of such corporation upon whom process may be served; that, such being true, an error was

committed by this court in failing to construe the act in connection with the prior law, so as to hold that an action against a foreign corporation can be prosecuted only in the county where the cause of action arose, or in the county where the corporation maintains its principal place of business; and that, as neither of these jurisdictional prerequisites has its source nor exists in Multnomah County, the judgment there rendered should have been reversed. The rule is universal that repeals by implication will not be upheld unless the repugnancy between a prior and a subsequent act, on the same subject, is so manifest that both enactments cannot remain in force, and that, if the later statute only modifies a prior law, the two must be construed as one act. *Sandys v. Williams*, 46 Or. 327 (80 Pac. 642); *Hall v. Dunn*, 52 Or. 574 (97 Pac. 811).

8. In the opinion it was intimated that the act of 1903 impliedly amended the statutes of this State so that jurisdiction of the person of the defendant, a foreign corporation, was obtained by the service of a summons upon its attorney in fact and resident general agent in Multnomah County, though the cause of action did not arise and the defendant's principal place of business is not located therein. It is generally held that when a foreign corporation, pursuant to the requirement of an act of the legislature, appoints an attorney in fact or other representative upon whom process should be served, the statutory method thus prescribed is exclusive, and service of the summons upon any other agent is ineffectual. Beale, *Foreign Corp.* § 268; Murfree, *Foreign Corp.* § 198.

9. A state, allowing a foreign corporation to do any lawful business within its limits, may, in order to protect the rights of her own citizens, impose such reasonable conditions as may be proper, so long as the restrictions prescribed do not trench upon the Constitution of the United States or violate the laws thereof or transgress the rules of public policy which secure the jurisdiction

and preserve the authority of each state from encroachment by all others, or invade that principle of natural justice which forbids condemnation without an opportunity to make a defense. *Lafayette Ins. Co. v. French*, 18 How. 404 (15 L. Ed. 451); *St Louis v. Ferry Co.*, 11 Wall. 423 (20 L. Ed. 192); *Doyle v. Continental Ins. Co.*, 94 U. S. 535 (24 L. Ed. 148).

10. A corporation is deemed to be a resident of that state by the laws of which it was created; but, as the artificial being may send agents into other states to transact any business that is not *ultra vires*, the state to which such representatives are dispatched may by proper legislation make the corporation liable to its citizens in actions and suits. A text writer, discussing this subject, says:

"It is generally held that if a corporation does business within a state, and thereby consents to be sued in the courts of that state, the consent is not confined to causes of action arising within the state, but that the corporation may there be sued upon any transitory cause of action, whether in contract or in tort, no matter where it arose." Beale, *Foreign Corp.* § 280.

11. Section 55, subd. 1, B. & C. Comp., was evidently intended to apply only to domestic corporations, but, in order to subserve justice, the enactment, in the absence of any express legislation on the subject, was necessarily held to apply to foreign corporations. *Farrell v. Oregon Gold Co.*, 31 Or. 463 (49 Pac. 876); *Riddle v. Order of Pendo*, 49 Or. 229 (89 Pac. 640). It is very doubtful if the act of 1903 was even an implied amendment, for prior thereto, no express enactment existed in Oregon regulating the service of process upon foreign corporations. "If by statute a foreign corporation," says an author, "is liable to suit in the county in which it does business, it can be sued in no other, though, if there is no such statute, a foreign corporation, not being a resident, may be sued in any county." Beale, *Foreign Corp.* § 295.

12. The requirement of the act of 1903 that a statement giving the location of the principal office of a foreign corporation shall be filed with the Secretary of State was evidently designed to afford evidence that it was doing business in the state, and not definitely to fix the place where actions against such corporations should be maintained.

We believe that the interpretation heretofore given to the act under consideration does not violate the rule applicable to implied amendments.

The petition for a rehearing is therefore denied.

AFFIRMED: REHEARING DENIED.

Argued February 9, decided March 2, rehearing denied June 1, 1909.

MULTNOMAH LUMBER CO. v. WESTON BASKET CO.

[99 Pac. 1046; 102 Pac. 1.]

APPEAL AND ERROR—RECORD—SCOPE AND CONTENTS—AFFIDAVITS.

1. Affidavits in support of a motion to set aside service of process, though included in the transcript, are no part of the record unless included in a bill of exceptions.

ATTORNEY AND CLIENT—RETAINER AND AUTHORITY.

2. An attorney being authorized by Section 1058, B. & C. Comp., to bind his client in any of the proceedings in a suit by his agreement filed in court, a general retainer authorizes an attorney to admit service of process whereby jurisdiction of the person of his client is conferred.

APPEARANCE—"SPECIAL APPEARANCE."

3. A "special appearance" is made by a party when he or his attorney seeks to obtain from the court an order vacating some proceeding which, it is insisted, has been undertaken by the adverse party in an unauthorized manner; such appearance being thus limited to prevent conferring jurisdiction of the person.

APPEARANCE—"GENERAL APPEARANCE."

4. A "general appearance" is the voluntary act of a party or his attorney, and is effectual to confer jurisdiction of the person without an order of court.

APPEARANCE—PROCEEDINGS CONSTITUTING APPEARANCE—STIPULATION.

5. A stipulation extending the time to answer in a suit against a foreign corporation signed by attorneys authorized to represent the parties and filed in court as required by Section 1058, B. & C. Comp., constitutes a "general appearance" within Sections 63, 5-8, 542, 1049, 1050, so as to subject the corporation to the jurisdiction of the court.

CORPORATIONS—FOREIGN CORPORATIONS—ACTION AGAINST—JURISDICTIONAL AVERTMENT IN COMPLAINT.

6. The statement that a defendant foreign corporation is engaged in business in the State, necessary to secure jurisdiction of its person, may

appear anywhere in the record, and hence an averment of that fact in the complaint is not indispensable.

CORPORATIONS—FOREIGN CORPORATIONS—ACTION AGAINST—JURISDICTION TO SUPPORT JUDGMENT.

7. In absence of a voluntary appearance, no foreign corporation is subject to the jurisdiction of the State courts, unless it is engaged in the State in transacting some part of its corporate business when sued, which fact should appear somewhere in the record, to support a judgment rendered against it for failure to appear or answer after service of process on a resident agent.

CORPORATIONS—ACTION AGAINST FOREIGN CORPORATION—JURISDICTION—HOW ACQUIRED—APPEARANCE BY ATTORNEY.

8. Jurisdiction to render a judgment against a foreign corporation for failure to appear and answer may rest on its voluntary appearance by its duly appointed attorneys, which is equivalent to personal service of the summons as expressly provided by Section 68, B. & C. Comp.

From Multnomah: JOHN B. CLELAND, Judge.

This is an action by the Multnomah Lumber & Box Co. against the Weston Basket & Barrel Co. From a judgment in favor of plaintiff, defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *Mr. J. B. Ryan*, and *Mr. George W. Hardacre*, with an oral argument by *Mr. Ryan*.

For respondent there was a brief over the names of *Messrs. Platt & Platt*, with an oral argument by *Mr. H. G. Platt*.

Opinion by MR. CHIEF JUSTICE MOORE.

1. This is an appeal by the defendant, a corporation, from a judgment rendered against it, and the question involved is whether the court obtained jurisdiction of the defendant. The return of the sheriff states that the defendant corporation was personally served by him in Multnomah County December 10, 1906, by delivering a certified copy of the summons and of the complaint herein to its manager, B. F. Mackall, in person. There was filed in the lower court March 26, 1907, a writing subscribed by the attorneys of the respective parties, whereby the defendant was allowed until January 20, 1907, within which to plead or answer. The defendant

having engaged another attorney, the latter appeared specially April 15, 1907, and moved to set aside such service of process, on the ground that it was insufficient to secure jurisdiction of his client. There appears in the transcript certain unidentified affidavits which were evidently filed in support of the motion, and state, in effect: That the defendant was incorporated and exists under the laws of California, in which State it has its domicile and principal office; that it did not have an agency established in Oregon for the transaction of any of its business, or have any property therein; and that on December 10, 1906, its manager was in this State only while passing through it. The motion was denied. The defendant declined further to plead or answer, and judgment was rendered as hereinbefore stated. The journal entry of the judgment states that in response to the service of process the defendant, by its attorneys (naming them), made a general appearance and asked for additional time in which to plead, and it was granted.

The plaintiff's counsel object to a consideration of the sworn statements referred to, on the ground that no bill of exceptions has been sent up, and, such being the case, the affidavits, though included in the transcript, do not constitute any part of the record. These voluntary declarations under oath form the proof which tends to show that the defendant is a foreign corporation, and, like all other evidence, should have been included in a bill of exceptions and transmitted to this court, if they were to be considered. *Farrell v. Oregon Gold Co.*, 31 Or. 463 (49 Pac. 876); *Nosler v. Coos Bay Nav. Co.*, 40 Or. 305 (63 Pac. 1050; 64 Pac. 855); *State v. Kline*, 50 Or. 426 (93 Pac. 237). The complaint does not state that the defendant was not created by or under the laws of Oregon. It will be remembered that the judgment order states that the defendant, by its attorneys, "made a general appearance." This narration seems to negative the fact that any reliance was placed on the service of

process, but, rather, that dependence was put on such appearance as a means of securing jurisdiction of the person, from which it is reasonably to be inferred that the defendant is a foreign corporation; and it will be treated as such, basing the conclusion upon the recital and not upon the assertions contained in the affidavits, which sworn declarations will be disregarded.

2. The statute, regulating the power to subject parties to judgments and decrees, contains a clause as follows:

"No corporation is subject to the jurisdiction of a court of this State, unless it appear in the court, or have been created by or under the laws of this State, or have an agency established therein for the transaction of some portion of its business, or have property therein; and in the last case only to the extent of such property at the time the jurisdiction attached." Section 528, B. & C. Comp.

A corporation appears by attorney in all cases. Section 1050, B. & C. Comp. A voluntary appearance of the defendant shall be equivalent to personal service of the summons upon him. Section 63, B. & C. Comp. A defendant appears in an action or suit when he answers, demurs, or gives the plaintiff written notice of his appearance. Section 542, B. & C. Comp. An attorney is a person authorized to appear for and represent a party, in the written proceedings in any action, suit, or proceeding, in any stage thereof. Section 1049, B. & C. Comp. An attorney has authority to bind his client in any of the proceedings in an action, suit, or proceeding, by his agreement, filed with the clerk or entered upon the journal of the court, and not otherwise. Section 1058, B. & C. Comp. These excerpts from the statute have been given to indicate the method of procedure in the foregoing cases and to show the authority of an attorney to bind his client.

It is not pretended that the attorneys who, by stipulation, secured an extension of time within which to plead or answer, were not empowered to represent the

defendant; but it is argued that, to constitute a general appearance which will operate as a waiver of process, it must be manifest that some relief was demanded, the granting of which conferred jurisdiction of the party, and that as no action was taken by the court, pursuant to the stipulation, an error was committed in denying the motion to set aside the pretended service of the summons and a copy of the complaint. In support of the legal principle thus asserted, defendant's counsel calls attention to the case of *Belknap v. Charlton*, 25 Or. 41 (34 Pac. 758), where it was held that, when a defendant appears in an action or proceeding asking some relief which can be granted only on the hypothesis that the court has jurisdiction, the appearance is general, whether it be by its terms so limited or not; but, if granting the relief asked would be consistent with a want of jurisdiction, the appearance may be special without submitting to the jurisdiction for any other purpose.

3. In the stipulation filed herein, no attempt was made to restrict the appearance which was made by the attorneys who then represented the defendant, nor was any relief demanded in the agreement except such as the plaintiff's counsel were authorized to grant. The court did not make any order in relation to the stipulation, nor was any ruling thereon necessary, unless the plaintiff's counsel had attempted to violate the terms of their agreement by insisting upon a default before the expiration of the time limited. A special appearance is made by a party when he or his attorney in a suit or action seeks to obtain from the court an order vacating some proceeding which, it is insisted, has been undertaken by the adverse party in an unauthorized manner. Such appearance is thus limited to prevent conferring jurisdiction of the person, and the application for the relief sought presupposes the making of an order by the court either granting or denying it.

4. A "general appearance," however, is the voluntary act of the party or of his attorney. It is unlimited in its operation and, in so far as conferring jurisdiction of the person is concerned, is effectual without an order of court. A court might not sanction a stipulation which granted such unreasonable concessions as would practically impede the orderly progress of a trial or thwart the administration of justice, but, as the conferring of the jurisdiction of the person is the unconstrained act of a party, the court could not prevent the consequences of a general appearance, unless it was superinduced by fraud or made by a party incompetent to act, or under such circumstances as show that it ought not to be binding.

5. The defendant's counsel, contending that the stipulation referred to was ineffectual to confer jurisdiction of his client, relies upon a rule announced by a text-writer, to-wit:

"A general retainer does not authorize an attorney to accept service of process by which the court acquires jurisdiction over the party; but after the court has acquired jurisdiction over defendant's person, the attorney may accept service of all necessary and proper papers during the progress of the cause." 4 Cyc. 935.

The legal principle thus asserted may be applicable where no statute regulates the matter, but in this State an attorney has authority to bind his client in any of the proceedings in an action or suit by his agreement filed with the clerk or entered upon the journal of the court. Section 1058, B. & C. Comp. This enactment is sufficiently comprehensive to empower an attorney, under his general retainer, to admit in writing the service of process whereby jurisdiction of the person of his client is conferred. The right of the attorneys who signed the stipulation for the defendant to represent it is not controverted. In such case the rule promulgated in *Conrey v. Brenham*, 1 La. Ann. 397, 398, is controlling, viz: "The dignity of the profession, and the necessity,

for the convenient administration of justice, that great confidence should be reposed by the courts in attorneys at law, warrant the presumption, in the absence of contrary proof, that an acceptance of service by an attorney of record is authorized by his client." In *State ex rel. v. Messmore*, 14 Wis. 125, the defendant, after the service of a summons upon him, obtained an extension of time in which to answer, pursuant to a stipulation to that effect, and it was held that he had appeared in the action, thereby waiving all objections to the form of process. So, too, in *Peters v. St. Louis Ry. Co.*, 59 Mo. 406, it was ruled that, where a party consents to a continuance of the cause, he thereby waives any insufficiency of the summons and subjects himself to the jurisdiction of the court. As illustrating this rule, see, also, *Briggs v. Stroud* (C. C.) 58 Fed. 717; *Keeler v. Keeler*, 24 Wis. 522; *Baisley v. Baisley*, 113 Mo. 544 (21 S. W. 29: 35 Am. St. Rep. 726).

The defendant's attorneys, who were originally retained, having been granted an extension of time in which to plead or answer, and such stipulation having been filed in this action, thereby appeared generally and subjected their client to the jurisdiction of the court; and, this being so, the judgment is affirmed.

AFFIRMED.

Decided June 1, 1909.

ON PETITION FOR REHEARING.

[102 Pac. 1.]

Opinion by MR. CHIEF JUSTICE MOORE.

6. In a petition for a rehearing it is contended that the complaint herein does not state facts sufficient to constitute a cause of action, in that it does not aver that the defendant corporation was engaged in business in Oregon, or allege that at the time the action was com-

menced it had property therein, and that, such being the case, the appearance by counsel did not confer upon the court jurisdiction of the person of the defendant. In *St. Clair v. Cox*, 106 U. S. 350, 359 (1 Sup. Ct. 354, 362: 27 L. Ed. 222), Mr. Justice FIELD, in speaking of the right of a court to hear and determine a cause against a foreign corporation which had not appeared in the action, said: "It is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record—either in the application for the writ, or accompanying its service, or in the pleadings or the finding of the court—that the corporation was engaged in business in the State." It will thus be seen that, as the necessary statement that the foreign corporation was engaged in business in the State might appear anywhere in the record, an averment of that fact in the complaint was not indispensable to securing jurisdiction of the person of the defendant.

7. In the absence of a voluntary appearance, no foreign corporation is subject to the jurisdiction of the courts of this State, unless it is engaged therein in transacting some part of its corporate business at the time the action was commenced, which fact should appear somewhere in the record, in order to support a judgment rendered against such corporation for failure to appear or answer after the service of process upon one of its agents in Oregon. *Aldrich v. Anchor Coal Co.*, 24 Or. 32 (32 Pac. 756: 41 Am. St. Rep. 831); *Farrell v. Oregon Gold Co.*, 31 Or. 463 (49 Pac. 876). "A corporation," says Mr. Justice CURTIS, in *Lafayette Ins. Co. v. French*, 18 How. 404, 407 (15 L. Ed. 451), "may sue in a foreign state by its attorney there, and, if it fails in the suit, be subject to a judgment for costs. And so if a corporation, though in Indiana, should appoint an attorney to appear in an action brought in Ohio, and the attorney should appear, the court would have jurisdiction to render a

judgment in all respects as obligatory as if the defendant were within the state."

8. In the case at bar the jurisdiction of the person of the defendant corporation is not based upon the service of the summons, thereby necessitating a statement of fact to the effect that the Western Basket & Barrel Company was engaged in business in the State, but such jurisdiction rests upon the voluntary appearance of the defendant by its duly appointed attorneys, which is equivalent to personal service of the summons. Section 63, B. & C. Comp. In *St. Clair v. Cox*, 106 U. S. 350, 353 (1 Sup. Ct. 354, 357: 27 L. Ed. 222), in discussing methods prescribed for securing jurisdiction of the person of a defendant, it is said: "The courts of the United States only regard judgments of the state courts establishing personal demands as having validity or as importing verity where they have been rendered upon personal citation of the party, or, what is the same thing, of those empowered to receive process for him, or upon his voluntary appearance."

The defendant herein appeared in the latter manner, and, having submitted itself to the jurisdiction of the court, it is bound by the judgment rendered; and, this being so, the petition for a rehearing is denied.

AFFIRMED: REHEARING DENIED.

Argued February 26, decided April 13, rehearing denied June 1, 1900.

BERNHEIM v. TALBOT.

[100 Pac. 1107.]

BOUNDARIES—ESTABLISHMENT—ACQUIESCENCE.

1. Where a government survey made according to Act September 27, 1850, c. 76 (9 U. S. Stat. 497), for the purpose of dividing a donation land claim between a husband and wife, has been acquiesced in for a long time, it is conclusive as to the location of the dividing line, and such line is not changed by the location of a quarter section line.

BOUNDARIES—ESTABLISHMENT—OFFICIAL SURVEY.

2. An east and west quarter section line is not necessarily the same as a division line between the north half and the south half of a donation land claim of a husband and wife divided by the Surveyor General according to a

survey made under Act September 27, 1850, c. 76 (9 U. S. Stat. 497), because Rev. St. U. S. § 2396, requires section lines to be straight lines from the established corners to the opposite corresponding corners.

REFORMATION OF INSTRUMENTS—(GROUNDS—MISTAKE.

8. An ambiguity arising out of a mortgagor's misconception that a quarter section line and the division line between the north half and the south half of a donation land claim were identical is not ground for correcting the description, when the language clearly shows that the mortgagor intended to convey to the division line established by the government survey, by which the claim was divided.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Statement by MR. JUSTICE EAKIN.

This is a suit by Theodore Bernheim, trustee, against Ella Talbot, to enjoin a trespass and irreparable injury by defendant upon lots 1 to 8 in block 4, 1 to 16 in block 6, 1 to 10 in block 7, and 1 to 25 in block 5, Council Crest Park, City of Portland, county of Multnomah, State of Oregon.

Plaintiff alleges that he is the owner of said lots, and that defendant is trespassing thereon, and is about to cut certain growing trees thereon, to his irreparable injury.

The answer admits that plaintiff is the owner of all of said lots except 1, 2, 3, and 4 of block 4, and lot 1 in block 5, and denies all other allegations of the complaint, and, by cross-complaint, for affirmative relief, alleges that she is the owner of a strip of ground bounded as follows:

"Commencing at a point in the north boundary line of the southwest $\frac{1}{4}$ of section 9, township 1 south, range 1 east of Willamette Meridian, at the intersection of the east boundary line of the John B. and Sarah A. Talbot donation land claim, near which point is planted an iron rod; running thence west, along the north boundary line of the southwest $\frac{1}{4}$ of section 9, four hundred and twenty-eight and eleven hundredths (428.11) feet, more or less, to the center of the county road; thence north to the division line between the John B. Talbot half and the Sarah A. Talbot half of the donation land claim of the said John B. and Sarah A. Talbot; thence east, along the said dividing line between said John B. Talbot half and said Sarah A. Talbot half of said donation land claim,

428.11 feet, more or less, to a stone marked 'T,' which is set at the eastern extremity of said dividing line between the said north and south half of said claim; thence south along the east line of the Sarah A. Talbot half of said donation land claim, to the place of beginning."

And that portions of said lots 1, in block 5, and 1, 2, 3 and 4, of block 4, overlap and are included in said strip of land belonging to defendant, and further alleges that the true boundary line between the property of plaintiff and defendant is the quarter section line between the southwest $\frac{1}{4}$ and the northwest $\frac{1}{4}$ of said section 9, the intersection of which with the east line of said donation land claim is marked by said iron rod, and prays that the north line of plaintiff's property be adjudged to be the said north line of the said southwest $\frac{1}{4}$ of section 9.

Plaintiff denies the affirmative matter of the answer and cross-complaint, and pleads title to the property claimed by him through a mortgage executed by defendant's ancestor, Sarah A. Talbot, and foreclosure and sale thereunder. Both parties deraign title through Sarah A. Talbot. John B. Talbot and Sarah A., his wife, were patentees of the donation land claim No. 65, by the terms of which patent Sarah A. Talbot owned the south half of the claim, and on March 30, 1891, she mortgaged to the Savings & Loan Society the following portion thereof:

"Commencing at a point in the north boundary line of the southwest quarter of section 9, marked by a stone, the same being the middle point in the east line of said D. L. C., and also the northeast corner of the south (or Sarah Ann Talbot) half of said D. L. C. of John B. and Sarah A. Talbot; thence running south along the east line of said D. L. C., 160 rods, to a point in the south line of said section 9, the same being the southeast corner of said D. L. C. of John B. and Sarah Ann Talbot; thence west along the south line of sections 8 and 9, 110 rods; thence north, 160 rods, to a point in the division line between the John B. Talbot half of said claim and the Sarah Ann Talbot half thereof; thence east along

said division line, 110 rods, and to the point of commencement, containing 110 acres of land (also other real estate)."

Prior to this time, on November 18, 1882, said Sarah A. Talbot, who had acquired title thereto, conveyed to James Bennett a parcel of ground 4.47 chains square, described as "commencing at the northeast corner of the south half of the John B. Talbot and Sarah A. Talbot donation land claim," running thence west and north. The cause was tried before the court, whose findings were in favor of plaintiff, and from a decree thereon defendant appeals.

AFFIRMED.

For appellant there was a brief with oral arguments by *Mr. Granville G. Ames* and *Mr. Cicero M. Idleman*.

For respondent there was a brief over the names of *Mr. Charles H. Carey*, *Mr. Lotus L. Langley* and *Mr. Harrison Allen*, with an oral argument by *Mr. H. K. Sargent*.

MR. JUSTICE EAKIN delivered the opinion of the court.

1. The difficulty in this case arises largely in determining the joint of intersection of the division line between the north $\frac{1}{2}$ and south $\frac{1}{2}$ of the donation land claim with the east line thereof. Counsel for defendant in his brief assumes that "a point in the north boundary line of the southwest $\frac{1}{4}$ of section 9 where it intersects the east line of the donation land claim," "the middle point in the east line of the donation land claim," and "the northeast corner of the south $\frac{1}{2}$ of said claim," refer to but one and the same point, which is not necessarily true. Counsel seems to take it for granted that the north line and south line of the donation land claim are identical with the north and south lines of sections 8 and 9, respectively. But by comparing the courses of the plat with those in the patent, it would seem they are not. The boundaries of the claim are south, west, north, and east, while the south lines of sections 8 and

9 are not due west, nor both in the same course, varying 1 degree and 6 minutes. The survey of the donation land claim was not part of the survey by which the government land was sectionized, but a special survey, recorded in a book for that purpose, under the provision of chapter 76, 9 U. S. Stat. 497 (Act. Sept. 27, 1850). The field notes of the survey of the claim may show, however, that its north and south lines were intended to follow the section lines, but this act provides that the wife shall have half of the claim in her own right, and that "the Surveyor-General shall designate the part enuring to the husband and that to the wife and enter the same in the record in his office." The evidence before us indicates that this division was made at or about the time of the survey of the claim.

The defendant, Miss Talbot, in her testimony states, in answer to the question:

"Q. 'Miss Talbot, you say that at the time you first became acquainted with the donation land claim of your mother and father that they had agreed, or soon thereafter agreed, upon the division line between the north and south half, and set a monument?'"

"A. 'I don't know as they particularly agreed, but in the division of the claim at the very commencement of that taking up of the claim and surveying it around there, I don't think I was old enough to remember it.'"

And in defendant's Exhibit 3, W. B. Marye, county surveyor of Multnomah County, on May 8, 1885, at the request of Sarah A. Talbot, established certain corners of the claim. He was not making a survey, but identifying old corners and placing permanent monuments. He says he found the northeast corner of the claim and at which he set a stone 24 inches in length and 6 inches square, and squared off at the top and running to a point, with the letter "T" sunk thereon on the south side.

"I then went to the corner stake, the same being at the intersection of the division line of said Talbot donation land claim, where the same intersects the east boundary line of said claim. Said stake was set by

Leland, a Government surveyor. I replaced this stake with a stone monument, the same length and width as a stone monument heretofore mentioned, with the letter "T" facing west."

This is corroborated by Miss Talbot:

"Q. 'Now, about the boundaries with this northeast corner of the tract of land that was mortgaged to the company, do you know when that corner was established where the stone monument now is?'

"A. 'Yes, sir. * * '

"Q. 'When was it?'

"A. 'Well, as far back as I can remember, there was a stake there. Then, when Mr. Burch made the survey of the claim for the Ford tract, he ran through the claim and drove another stake, and it was a cherry and the cherry—a cherry stake does not last very long. It decays and it was then getting to be, when the stone monument was set there—it was getting to be a pretty well decayed stake, and for that reason my mother had the monument set both at the northeast corner and that division and at the southeast corner. The witness trees at the northeast corner had been chopped down by men who had been put in there to cut cordwood, and there was nothing but stumps left, and there was virtually the same intention to obliterate that line, and for that reason we had this monument set, and we always called that line the line between the north and south half of father's and mother's tract.'

"Q. 'Up to 1885 or 1886 was there ever any other line known to you or to the family, so far as you knew, on the dividing line between your father's and mother's part, except the one running to the stone marked "T"?' * * '

"A. 'No. The line in the claim was established, the center of the claim line was established after we had a suit in court, establishing the eastern boundary of the claim. Then the commissioners drove an iron rod, and after that time we considered that the center of the claim, but all deeds prior to that were made from the old claim line from the center of the claim.'

"Q. 'And that was marked at that point by the stone?'

"A. 'That was marked at that point by the stone marked "T," turned west. That was the only monument my mother saw set.' * * '

"Q. 'That was the suit with Judge Marquam?'

"A. 'Yes. Then after that the surveyors squabbled, and had so many fusses over that line, between that and in making her mortgages on her half of the claim, she took that line through the center of the claim as the section line.' "

This is further corroborated by defendant's statement in her answer describing the north line of the tract she now claims as "thence north to the division line between the John B. Talbot half and the Sarah A. Talbot half of the donation land claim of said John B. and Sarah A. Talbot; thence east, along said dividing line between the said John B. Talbot and the said Sarah A. Talbot half of said donation land claim, 428.11 feet, more or less, to a stone marked 'T,' which is set on the eastern extremity of said dividing line between the north and south half of said claim." So we conclude there can be no doubt but the stake, replaced by a stone marked "T" turned west by Marye in 1885, was the monument set at or about the time of the survey of the claim as marking the point in the eastern boundary of the claim, indicating the boundary between the part inuring to the husband and that to the wife, as designated by the Surveyor-General, and has been acquiesced in for many years by both parties thereto, and is conclusive now as indicating the intersection of the middle boundary line with the east line of the claim.

2. Evidently, as shown by the testimony of Miss Talbot, Sarah A. Talbot attempted in 1888 to adopt or accept the quarter section lines through sections 8 and 9 as the division line through the claim, and to substitute the point fixed by the iron pipe for the one fixed by the Government surveyor, as actually indicating the northeast corner of the south half of the claim. But the proof does not establish that this is the middle of the east line of the claim, nor does the location of the quarter section line change the line of division acquiesced in for so long. Another reason why the east and west quarter section

lines through sections 8 and 9 are not necessarily the same, as the dividing line through the claim, is that the quarter section lines must be "straight lines from the established corners to the opposite corresponding corners" (Rev. St. U. S. § 2396 [U. S. Comp. St. 1901, p. 1473]); and by reason of the fact that the section lines are not always parallel with corresponding opposite lines, nor are all section lines the same length. The quarter section lines through a section do not necessarily bisect each other. Neither are the east and west quarter section lines through sections 8 and 9 necessarily one continuous straight line, nor do they necessarily bisect the east and west lines of the donation land claim. The opposite boundary lines of the claim are parallel and of equal length, and therefore the quarter section line of section 9 can have no relation to the dividing line of the claim. The quarter section lines are not necessarily the basis upon which the division of the claim must be ascertained. The result of the action of the commissioners, who in 1888 established the line between the Talbot donation land claim and the Donor claim on the east, which may be the east line of the Talbot claim, has no bearing upon the point of intersection of the division line of the Talbot claim with the east line thereof. There was no controversy as to that point, and, by the return of the commissioners, it appears they were not attempting to run on the east line of the Talbot claim, as described in the patent, as they commenced at a point 10 chains east of the northeast corner of section 8, while that corner of the claim is described in the patent as 9.47 chains east of that corner. In any event, the result of the acts of the commissioners has no influence upon the question here.

3. We will next consider whether the mortgage is ambiguous. A mistake in it cannot be corrected in this suit as the facts are not alleged nor are the parties present to authorize such relief. 24 Am. & Eng. Enc.

Law (2 ed.) 655. The only ambiguity that can be suggested arose out of a misconception by Sarah A. Talbot at the time the mortgage was executed that the quarter section line and the division line of the claim were identical. There can be no doubt from the language of the mortgage but what she intended to convey to the middle line of the donation land claim. It is expressly so stated:

"Commencing at a point * * marked by a stone, the same being the middle point in the east line of said donation land claim and also the northeast corner of the south (or Sarah A. Talbot) half of said donation land claim."

The third and fourth courses are described as:

"Thence north 160 rods to a point in the division line between the John B. Talbot half of said claim and the Sarah A. Talbot half thereof; thence east along said division line 110 rods, and to the point of commencement."

We find no ambiguity in this description, and we conclude that the description includes the ground in controversy in this suit.

The decree will be affirmed.

AFFIRMED: REHEARING DENIED.

Decided June 1, 1909.

HANLEY v. STEWART

[102 Pac. 2.]

APPEAL AND ERROR—PERFECTING APPEAL—"OTHER ACT."

1. The "other act," referred to in Section 549, subd. 4, B. & C. Comp., providing that, where a party in good faith gives due notice of an appeal, and thereafter omits, through mistake, to do any other act necessary to perfect the appeal, the court may permit an amendment or performance of such act, is the filing of an undertaking on appeal, an omission to do which through mistake may be supplied on application therefor.

APPEAL AND ERROR—PERFECTING APPEAL—AUTHORITY OF TRIAL COURT.

2. When an appeal is perfected, the authority of the court to allow an alteration for the completion of some act relating to the filing of a proper undertaking necessarily ceases.

APPEAL AND ERROR—FILING OF TRANSCRIPT—EXTENSION OF TIME.

3. An appellant, discovering that it will be difficult to file a transcript within the thirty days limited therefor, may on application, as authorized by Section 553, subd. 2, B. & C. Comp., obtain an extension before default occurs.

APPEAL AND ERROR—FAILURE TO FILE TRANSCRIPT—EFFECT.

4. Since an order of the trial court, made after an appeal was perfected, setting aside the notice of appeal, etc., is a nullity, the failure to file a transcript within the time prescribed after perfecting the appeal operates as an abandonment of the appeal.

From Jackson: HIERO K. HANNA, Judge.

ON MOTION TO DISMISS.

Clarence L. Reames for the motion.

William I. Vawter, contra.

Opinion by MR. CHIEF JUSTICE MOORE.

1. This is a motion to dismiss an appeal. The facts are that a decree in this suit was given September 11, 1908, and 11 days thereafter a notice and an undertaking on appeal were served and filed. No exception was taken to the sufficiency of the sureties on the undertaking, and the appeal was perfected September 27, 1908 (Section 549, B. & C. Comp.), but no abstract or transcript on appeal was filed within 30 days therefrom, as required. Section 553, B. & C. Comp. The trial court, on motion of the appellant, December 16, 1909, dismissed the notice of appeal and all proceedings had in reference thereto. Another notice and an undertaking on appeal were thereafter served and filed, and the transcript was sent up to this court within 30 days from the filing of the second undertaking. The statute prescribes the time and manner of taking appeals, and contains a clause as follows:

"When a party in good faith gives due notice * * of an appeal from a judgment, order, or decree, and thereafter omits, through mistake, to do any other act (including the filing of an undertaking as provided in this section) necessary to perfect the appeal or stay proceedings, the court or judge thereof, or the appellate court, may permit an amendment or performance of such act on such terms as may be just." Section 549, subd. 4, B. & C. Comp.

The "other act" thus referred to, which is "necessary to perfect the appeal or to stay proceedings," is the filing of an undertaking on appeal, an omission to do which, through mistake, when the party has acted in good faith, has always been supplied, upon application therefor. *Matlock v. Wheeler*, 29 Or. 64 (40 Pac. 5: 43 Pac. 867); *Elwert v. Norton*, 34 Or. 567 (51 Pac. 1097: 59 Pac. 1118); *Mendenhall v. Elwert*, 36 Or. 375 (52 Pac. 22: 59 Pac. 805); *Nottingham v. McKendrick*, 38 Or. 495 (57 Pac. 195: 63 Pac. 822).

2. When an appeal is perfected, the authority of a court to allow an alteration or the completion of some act relating to the filing of a proper undertaking necessarily ceases.

3. Nor is it requisite that power to set aside a notice of appeal and an undertaking should exist; for, when the appellant discovers that it will be difficult to secure and file a transcript within the 30 days limited therefor, the time can be enlarged, if application for the extension is made before default occurs. Section 553, subd. 2, B. & C. Comp.

4. As the appeal herein was perfected when the trial court set aside the notice, etc., its order was a nullity; and, the transcript not having been filed in this court within the time prescribed, the appeal was abandoned. *Nestucca Wagon Road Co. v. Landingham*, 24 Or. 439 (33 Pac. 983); *Harrington v. Snyder*, 53 Or. 573 (101 Pac. 392).

It follows that the appeal must be dismissed, and it is so ordered.

DISMISSED.

Argued March 17, decided June 1, 1909.

FLEGEL v. DOWLING.

[102 Pac. 178.]

FRAUDS, STATUTE OF—SUFFICIENCY OF MEMORANDUM—DESCRIPTION OF PROPERTY.

1. The written memorandum of an agreement to sell realty should contain sufficient description to show a common intention with reference to a

particular piece of property; and a memorandum, dated at Portland, where the parties resided, describing the subject-matter of the contract as lots 3 and 4, block 18, A. H., which the evidence showed meant Albina Homestead, of which a plat had been duly recorded in Multnomah County, in which Portland is situated, which plat shows a block 18 containing lots 3 and 4, taken in connection with admissions in the pleading that defendant owned lots 3 and 4, block 18, in Multnomah County, Oregon, sufficiently identifies the property described to satisfy the statute of frauds, though the writing did not state the county and the state in which the property was situated.

FRAUDS, STATUTE OF—REQUISITES OF WRITING—SIGNATURE—SIGNING BY AGENT.

2. The real estate agent's authority being only to find a purchaser for the owner, and not to execute a contract of sale, it is unnecessary that his authority be in writing, in order to bind a purchaser from the owner, who was procured by the agent, so that, where the memorandum merely acknowledged receipt by the agent of an offer from the owner to the purchaser upon the terms stated therein, subject to the owner's approval, the agent's authority could be shown by parol evidence.

BROKERS—REAL ESTATE BROKERS—SCOPE OF AUTHORITY.

3. A real estate agent is not ordinarily authorized to conclude or execute a contract of sale, but merely to find a purchaser for the owner, leaving the terms and conditions of sale to further negotiations between him and the purchaser.

FRAUDS, STATUTE OF—REQUISITES OF MEMORANDUM—DESCRIPTION OF PARTIES.

4. The memorandum evidencing a contract to sell realty must show the parties to the contract by some reference sufficient to identify them, and is sufficient if it shows with reasonable certainty the other party to the contract, in addition to containing the signature of the party to be charged.

VENDOR AND PURCHASER—CONTRACT—ACCEPTANCE—NECESSITY.

5. The acceptance of an offer to purchase realty, with the addition of an additional provision, amounted to a counter offer, and would not bind the purchaser until accepted by him.

FRAUDS, STATUTE OF—SUFFICIENCY OF MEMORANDUM—SEPARATE WRITINGS.

6. Several writings may be taken together to show a memorandum sufficient to satisfy the statute of frauds, and the writings are sufficient if, when taken together, they constitute a memorandum subscribed by the party to be charged, and showing the contracting parties, the subject-matter, and consideration.

FRAUDS, STATUTE OF—SUFFICIENCY OF MEMORANDUM—SEPARATE WRITINGS—PAROL EVIDENCE TO CONNECT WRITINGS.

7. A writing signed by defendant acknowledged receipt from M. of \$45, part payment on lots 3 and 4, block 18, Albina Homestead, purchase price \$900, payable \$350 cash, and remainder in three years at 6 per cent interest, and stated that the purchaser assumed a sewer assessment; and another writing, signed by M. as agent, recited receipt from plaintiff's assignor of \$50, part payment on lots 3 and 4, block 18, Albina Homestead, purchase price \$900, with a sewer assessment, terms \$350 cash, and balance in three years at 6 per cent, and stated that it was subject to the owner's approval. In an action by plaintiff to compel a conveyance of the property described in the writings, plaintiff offered to show by parol evidence that his assignor was the purchaser of the property, and that M. was defendant's agent to bring the parties

together, and not the purchaser, as indicated by the first memorandum. *Held*, that the evidence was admissible to connect the instruments and show the nature of the transaction to which they referred, and that plaintiff's assignor, and not M., was the real purchaser.

FRAUDS, STATUTE OF—SUFFICIENCY OF MEMORANDUM—SALE OF REAL PROPERTY.

8. The writings, when taken together and explained by the surrounding circumstances, are sufficient, within the statute of frauds, to show a valid contract by defendant with plaintiff's assignor to sell the property upon the terms stated therein.

SPECIFIC PERFORMANCES—MUTUALITY—NECESSITY OF SIGNATURE OF BOTH PARTIES.

9. Specific performances may be granted at the suit of one who did not sign the contract, against the other party who did sign it.

From Multnomah: ARTHUR L. FRAZER, Judge.

Statement by MR. JUSTICE SLATER.

This suit was brought by the plaintiff, A. F. Flegel, as assignee of Peter Kregar, against Peter Dowling, to enforce the specific performance of an alleged contract, made by the defendant with Kregar, whereby the former agreed to sell to the latter, lots 3 and 4, in block 18, of Albina Homestead, in Multnomah County, Oregon, for the agreed price of \$800, together with \$76.20 sewer assessment thereon, to be paid by the purchaser; \$350 of the purchase price to be paid in cash, and the remainder thereof in three years, with interest at 6 per cent per annum, payable semi-annually.

It is alleged in the complaint that defendant is the owner of the property described, and that the alleged agreement was entered into, and memoranda thereof were made and signed, by the defendant in the following manner and form; that James Maguire, acting as agent of the defendant, but without written authority, executed and delivered to Peter Kregar the following receipt and memorandum:

“Portland, Or., May 24, 1906.

“Received from Peter Kregar \$50, part payment on lots 3 and 4, block 18, A. H., purchase price \$800, with \$76.20 sewer assessment; terms, \$350 cash, balance in three years, at 6 per cent. This is subject to owner's approval.

(Signed)

“James Maguire, Agent.”

That Maguire reported to defendant, for his approval and ratification, the receipt by the former of \$50, as part payment, and the making of the memorandum or receipt, and that defendant approved and ratified the same, and executed the following receipt or memorandum as evidence thereof:

"Portland, Or., May 25, 1906.

"Received of James Maguire \$45, part payment of lots 3 and 4, block 18, Albina Homestead, purchase price \$800, payable \$350 cash, and the remaining \$450 payable in three years, at the rate of 6 per cent per annum, interest payable semi-annually. The conditions of this sale are that the owner is to furnish a clear title to said lots, and good and sufficient warranty deed, and an abstract, the cost of the abstract is to be paid by the purchaser. The purchaser assumes \$76.20 sewer assessment.

(Signed)

"Peter Dowling."

It is also alleged that Kregar paid Maguire, as agent of defendant, the \$50 mentioned in the first receipt or memorandum, and of that amount the latter paid \$45 to Dowling; that the second receipt, as well as the first, was delivered to Kregar; that Kregar duly assigned his interest in said contract to the plaintiff, who thereafter made a proper tender to defendant of the cash payment and of a note and mortgage, duly executed by plaintiff and his wife, for the amount of the deferred payment, accompanied by a demand for a deed, with a refusal by defendant to comply therewith.

The answer admits defendant's ownership of the property described in the complaint, but, by general denial, traverses the remainder thereof. At the close of plaintiff's testimony, defendant declined to offer any testimony in his own behalf, and thereupon the court made findings in his favor, upon which a decree was entered dismissing the complaint, and from which the plaintiff has appealed.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. John W. Reynolds*.

For respondent there was a brief and an oral argument by *Mr. James Gleason*.

MR. JUSTICE SLATER delivered the opinion of the court.

Upon the trial, Maguire, as plaintiff's witness, testified that his occupation was that of a real estate agent, and that he was acquainted with the defendant. When asked to state what, if any, arrangement or authority was given him by defendant relative to the sale of his property, an objection was interposed by defendant to the effect that, as the matter inquired about, concerned the sale of real property, his authority should be in writing. Thereupon, without the question having been answered, plaintiff offered in evidence the first receipt above noted, which was received in evidence over defendant's objections. The second receipt or memorandum was then offered, but was objected to by defendant, upon the ground that it appeared to be a memorandum of a transaction between parties different from those mentioned in the first receipt, and that the description of the property therein was insufficient to identify it. The objection was sustained. Plaintiff was then permitted, subject to defendant's objections, and notwithstanding the ruling of the court sustaining the same, to place in the record parol testimony of Maguire that he had verbal authority from defendant to procure for him a purchaser for the premises for \$800, upon the terms stated in the memorandum; that he secured Kregar as a purchaser for the price, and upon the terms stated in the first receipt; that he reported the same to defendant for his confirmation, and paid him \$45 of the money received from Kregar; that defendant executed and delivered to him the second receipt or memorandum, which he thereafter delivered to Kregar, and that the two receipts referred to the same transaction. The plaintiff also gave testimony respecting the assignment to him by Kregar of his rights under the contract, which assignment is in writing and indorsed upon the first receipt.

1. The objections entered by defendant to plaintiff's testimony reach two provisions of the statute of frauds, the first of which declares an agreement for the sale of real property, or of any interest therein, to be void unless the same, or some note or memorandum thereof expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawfully authorized agent, and that evidence of the agreement shall not be received other than the writing, or secondary evidence of its contents in the cases prescribed by law, and the second of which declares that an agreement concerning real property, made by an agent of the party sought to be charged, is declared to be void, unless the authority of the agent be in writing. Section 797, subds. 6 and 7, B. & C. Comp. The first objection to be considered is that, owing to the absence of the name of the county and state wherein the property is located, the memoranda do not definitely describe the subject-matter of the contract. In *House v. Jackson*, 24 Or. 97 (32 Pac. 1027), this court held that any description by which property might be identified by a competent surveyor with reasonable certainty, either with or without the aid of extrinsic evidence, is sufficient to permit the specific performance of a contract in relation thereto; and in *Bingham v. Honeyman*, 32 Or. 129, 132 (51 Pac. 735; 52 Pac. 755), it was held that, where the property had been described as being in a designated county or locality, or in any other way so that it could be located by extrinsic evidence, it would be sufficiently definite in that regard. Now in the present case the subject-matter of the alleged contract is described in the first memorandum as lots 3 and 4, block 18, A. H. What the signification of the initials A. H. is, may be shown by parol testimony, and it is thus explained to be Albina Homestead. The memorandum containing the terms of the contract is dated at Portland, where the parties to the contract reside, and these facts, taken in connection with the admission in the pleadings that defendant is the

owner of lots 3 and 4, block 18, Albina Homestead, in Multnomah County, Oregon, are sufficient to identify the property. *Bogard v. Barhan*, 52 Or. 121 (96 Pac. 673). But aside from these considerations, descriptions of real property, omitting the town, county, or state where the property is situated, have been held sufficient where the deed or writing provides other means of identification. *Crotty v. Effler*, 60 W. Va. 258 (54 S. E. 345); *Hawkins v. Hudson*, 45 Ala. 482; *Webb v. Mullins*, 78 Ala. 111; *Garden City Sand Co. v. Miller*, 157 Ill. 225 (41 N. E. 753); *Lloyd v. Bunce*, 41 Iowa, 660; *Mee v. Benedict*, 98 Mich. 260 (57 N. W. 175; 22 L. R. A. 641; 39 Am. St. Rep. 543); *Norfleet v. Russell*, 64 Mo. 176; *McCullough v. Olds*, 108 Cal. 529 (41 Pac. 420); *Tewksbury v. Howard*, 138 Ind. 103 (37 N. E. 355); *Robeson v. Hornbarker*, 3 N. J. Eq. 60; *Quinn v. Champagne*, 38 Minn. 322 (37 N. W. 451).

In *Crotty v. Effler*, 60 W. Va. 258 (54 S. E. 345), it is said, at page 263, that: "Although the state, county, and district may be omitted from the description, it is essential that the land agreed to be sold be so described as to be capable of being distinguished from other lands. It is not necessary that the contract should contain such a description as, without the aid of extrinsic testimony, to ascertain precisely what was agreed to be sold." It should, however, contain a sufficient description to evidence a common intent of the parties to deal with respect to a particular piece of property as distinguished from other property. In this view the memoranda evidencing the contract are sufficiently specific to identify the property, when it is admitted and shown that there is, in Multnomah County, Oregon, a duly recorded plat of Albina Homestead, containing lots of the numbers and block corresponding to those stated in the memoranda.

2. The second objection to the validity of the contract, viz., that the authority of Maguire to act as the agent of Dowling in making a contract for the sale of the prop-

erty in question should be in writing, and that it cannot be shown by parol proof, is not well taken, because it is not alleged, nor is it attempted to be shown, that Maguire undertook to make a contract concerning the sale of real property, or that he had authority from defendant to enter into an agreement with another concerning the sale of this property. Maguire testifies that the arrangement with Dowling was "just the same as any other real estate man would have. I had a verbal agreement, and he gave me the price he wanted to sell at, and I listed it the same as I would any other property." The memorandum signed by Maguire as agent does not purport, upon its face, to make an agreement concerning real property, but amounts to no more than an acknowledgment by Maguire of the receipt of an offer from Kregar to the owner for the purchase of the property upon the terms therein stated, "subject to the owner's approval," accompanied by the tender of a part payment as evidence of good faith, which offer Maguire was authorized to receive and communicate to the defendant for his acceptance or rejection.

3. In general the authority vested in a real estate broker to sell property does not authorize him to conclude or execute a contract of sale, but simply empowers him to find a purchaser, leaving the terms and conditions of the sale subject to negotiations between his principal and such purchaser. *York v. Nash*, 42 Or. 321, 329 (71 Pac. 59). Such an agency is not within the statute of frauds, and may be shown by parol proof.

4. In *Wilson v. Hart*, 7 Taunt. 295, it was held that the statute of frauds does not exclude parol evidence to show that a written contract made between A., the seller, and B., the buyer, was, on B.'s part, made by him only as agent for C. Such evidence does not contradict the writing, but explains the transaction. *Ford v. Williams*, 21 How. 289 (16 L. Ed. 36). It is generally held that it is necessary the memoranda evidencing the contract

should show who the parties to the contract are by some reference sufficient to identify them, and if, in addition to its having the signature of the party to be charged, it appear, with reasonable certainty, who the other party to the contract is, it is sufficiently certain. Thus, a letter addressed by the defendant to, or received by him, from the plaintiff, sufficiently connected with other writings relied upon as constituting the memoranda, may be evidence to show the plaintiff to be a party to the contract, and the fact that the person to whom such letter was addressed was the agent of the plaintiff, and received it in that character, may be proved by parol evidence to show plaintiff to be the real promisee. Wood, St. Frauds, § 373.

5. The point to which plaintiff's parol testimony is directed, is not to show that Maguire attempted to make an agreement for his principal for the sale of real property, but to show that he was an agent to receive and transmit an offer and act as an intermediary between the contracting parties, nor to vary the terms of the second memorandum, but to explain the meaning of it, so that, where his name appears in the second memorandum apparently as principal, he was, in fact, acting as such agent; and, when this is shown, the effect of the second memorandum is to acknowledge the receipt and accept it as binding the offer made through him to the party subscribing the same. Moreover, it appears from the second memorandum that the offer made was accepted, but with the addition of a condition attached as to title and the furnishing of an abstract; and it would not have been binding upon Kregar except upon his acceptance thereof, and it amounts to a counter offer. Now, considering the nature of Maguire's agency, he was authorized to tender the same to Kregar for that purpose, which he did, and it was received by the latter, and accepted and acted upon by him, and therefore became a binding agreement.

6. The real question, then, in the case is this: Is the written evidence, subscribed by the defendant evidencing his acceptance of such offer, and containing the terms of the contract, sufficient to satisfy the requirements of the statute? The second memorandum, construed by itself, upon its face purports to state the terms of the contract of a sale made by Dowling himself as owner, with Maguire as a principal, and is sufficiently complete in all essential requirements to satisfy the statute, so as to be binding upon him. Construed by itself, it would undoubtedly sustain a suit in the name of Maguire for its specific enforcement, and it is contended by defendant that the terms thereof cannot be varied by parol proof to show that the former is not the real principal. On the other hand, plaintiff contends, in effect, that the second memorandum, signed by Dowling, is not the complete memorandum of the sale, but that the two must be taken and construed together as one transaction; but, when taken in connection with the surrounding circumstances, and as explained by the parol testimony, it develops that Kregar is the purchaser, and Maguire the agent of defendant to bring together the offer and acceptance of the respective parties. For this purpose we think the testimony of Maguire is admissible to show the circumstances under which the two instruments were executed, and how the parties acted with reference to them after they were executed, and what they did with them, and it remains to be determined what is the effect of them when considered together. Several writings may be taken together to make the memoranda of a contract sufficient to satisfy the statute. *Salmon Falls Mfg. Co. v. Goddard*, 55 U. S. (14 How.) 446 (14 L. Ed. 493); *Parkhurst v. Van Cortland*, 14 Johns. (N. Y.) 15 (7 Am. Dec. 427); *Lerned v. Wannemacher*, 9 Allen (Mass.) 416; Brown, St. Frauds, 359. Whatever form the agreement may assume, if the writing, or writings, viewed as a whole, constitute in essence and substance upon their

face a note or memorandum in writing, subscribed by the party to be charged, showing who the contracting parties are, the subject-matter of the sale, and the consideration, the statute is satisfied. *Jenkins v. Harrison*, 66 Ala. 345, 357; *Carter v. Shorter*, 57 Ala. 253; *Knox v. King*, 36 Ala. 369.

In *Knox v. King*, 36 Ala. 369, it was held that, when the memorandum in writing is itself complete, it cannot derive aid from another writing, unless the memorandum referred to the other writing, and also that oral evidence cannot be received to connect the two, or supply the wanting links. But in *Jenkins v. Harrison*, 66 Ala. 345, 357, it was held that the rule was not absolute, and that there are cases in which parol evidence of contemporaneous facts and of circumstances in which the parties were when the writings were signed will be received in evidence. *Thayer v. Luce*, 22 Ohio St. 62; *Salmon Falls Mfg. Co. v. Goddard*, 55 U. S. (14 How.) 446 (14 L. Ed. 493); *Beckwith v. Talbot*, 95 U. S. 289 (24 L. Ed. 496). In this last case it was said: "There may be cases in which it would be a violation of reason and common sense to ignore a reference which derives its significance from such proof. If there is ground for any doubt in the matter, the general rule should be enforced. But when there is no ground for doubt, its enforcement would aid, instead of discouraging fraud." In a still later case, that of *White v. Breen*, 106 Ala. 159 (19 South. 59: 32 L. R. A. 127), that court again emphasizes the following exception to the general rules stated by that court in *Knox v. King*, 36 Ala. 369: That the first rule there announced does not necessarily require express mention in one document of another, or in each of all other documents; that the second rule is subject to the exception which obtains generally in the construction of written contracts; that the situation and circumstances of the parties may be looked to, when necessary, to aid in arriving at the meaning of the parties from

what they have written. At page 168 of the opinion (106 Ala., at page 61 of 19 South. [32 L. R. A. 127]), it is said: "That when all the writings adduced, viewed together in the light of the situation and circumstances of the parties at the time they were written, show unmistakably that they relate to the same matter, and constitute several parts of one connected transaction, so that the mind can come to no other reasonable conclusion from the evidence so offered than that they were each written with reference to those concurrent or preceding, then there is such a reference of the one to the other as satisfies the rule, although reference in express terms does not appear. The rule is one founded on reason; and when as practical men, we look at the writings, and see inhering in them evidence which entirely satisfies the mind that they all relate to one general transaction, there is no reason why they should not be so construed. There is in such case a direct reference of the one to the other within the meaning of the law."

8. Under the circumstances surrounding the execution of the two memoranda in evidence, as disclosed by the parol testimony, we are impelled to the conclusion that these two papers are to be taken and construed together as parts of one transaction; and, when construed in connection with the circumstances under which they were executed, and with the acts of the parties in reference thereto after they were executed, they import, upon their face, all the essential elements required by the statute of a contract by the defendant with Kregar to sell to him the property upon the terms therein stated.

9. Defendant further contends that because Kregar has not signed the contract there is no mutuality therein, for which reason he cannot in equity enforce the contract; but, by the great weight of authority, the exception to the general principle requiring mutuality of obligation as a condition to a specific performance of a contract that specific performance may be granted at

the instance of a party not originally bound within the statute of frauds, because he did not sign the contract against another who did sign it, is so firmly established that it now appears to be the established rule in most jurisdictions. *Justice v. Lang*, 42 N. Y. 493 (1 Am. Rep. 576); *Western Timber Co. v. Kalama River Lum. Co.*, 42 Wash. 620 (85 Pac. 338; 6 L. R. A. [N. S.] 397; 114 Am. St. Rep. 137), and cases cited in the footnote to that case. This appears to be the rule heretofore announced and adhered to by this court. *Case T. M. Co. v. Smith*, 16 Or. 381 (18 Pac. 641); *Johnston v. Wadsworth*, 24 Or. 494 (34 Pac. 13).

From these considerations it necessarily follows that the decree of the trial court should be reversed, and one entered here requiring the defendant to accept and receive the tender made to him by the plaintiff, and to convey to the plaintiff, by a good and sufficient warranty deed, the premises described in the complaint, within 30 days from and after the filing of the mandate in the court below, and, in default thereof, that such decree stand for, and be equivalent to, a conveyance of the title thereof from the defendant to the plaintiff; and it is so ordered.

REVERSED: DECREE RENDERED.

Argued May 3, decided June 1, 1909.

BOE v. ARNOLD.

[102 Pac. 290.]

PUBLIC LANDS—GRANTS TO STATES—SELECTION OF LANDS.

1. Act Cong. July 5, 1866, c. 174, 14 Stat. 89, granted to Oregon for the construction of a military wagon road, alternate odd-numbered sections of public land, three sections per mile to be selected within six miles of said road, and Act June 18, 1874, c. 305, 18 Stat. 80, provided that patent should issue to the grantee of the State after the lands had been selected and approved. *Held*, that the selection by a road company to which the State granted its right and the filing of the selection list did not pass the title from the government until the selection was approved by the Secretary of the Interior.

PUBLIC LANDS—GRANTS FOR INTERNAL IMPROVEMENT—ASSIGNMENT BY STATE—RIGHTS OF GRANTEE.

2. Where a military wagon road company, as assignee of the State, has filed its selection of lands under Act Cong. July 5, 1866, c. 174, 14 Stat. 89, grant-

ing to the State certain land to aid in the construction of a military wagon road to be selected within six miles of the road, and thereafter a part of the land is withdrawn by the Secretary of the Interior and other lands selected by the company were taken by it in place of the lands withdrawn, so that the company had received its full quota of lands under the grant, a grantee of the wagon road company is estopped from claiming land covered by the original selection.

ADVERSE POSSESSION—PUBLIC LAND—PRIOR GRANT.

3. One claiming title to land by adverse possession for a period of ten years as against all persons, but recognizing the superior title of the United States Government, and seeking in good faith to acquire that title, may assert such adverse possession as against any person claiming to be the owner under a prior grant.

From Malheur: GEORGE E. DAVIS, Judge.

Statement by MR. JUSTICE MCBRIDE.

Plaintiff, Christ C. Boe, brings ejectment against Hoyt Arnold, defendant, to recover certain land situated in Malheur County.

Defendant makes general denial, and pleads the following separate defenses: (1) That he is in possession as lessee of A. N. Soliss, and that Soliss is the owner in fee of the demanded premises. (2) Act Cong. July 5, 1866, c. 174, 14 Stat. 89, granting to the State of Oregon three sections of land per mile of road, to be selected within six miles on each side of said road, to aid in the construction of a wagon road from Albany to the eastern boundary of the State; and the further act of June 18, 1874 (18 Stat. 80, c. 305), providing that patent should issue to grantee of the State after the lands have been selected and approved, and alleges that the map of definite location of the eastern section of said road was filed July 10, 1871; that the demanded premises were within the limit prescribed by the act, and were selected by the Willamette Valley & Cascade Mountain Wagon Road Company, September 27, 1886; that the Commissioner of the General Land Office is alleged to have been directed to withdraw the odd sections falling within the limits designated on an accompanying plat, June 2, 1872, but such plat was not received by the local land office at La Grande until July 5, 1883; that on February 18, 1893,

Josiah H. Chandler, predecessor in interest to defendant and from whom A. N. Soliss, defendant's lessor, derails title, filed his application for a homestead on said land, alleging continuous settlement since 1881. The answer also alleges a contest on the part of the company, a decision in favor of Chandler by the local land office, and successive appeals from that office to the Commissioner of the General Land Office and Secretary of the Interior, in all of which the decision of the local land office was affirmed, and, after notice to the company, was made final. It further alleges that neither said company nor any one in its behalf questioned said decision, but, on the contrary, said company and plaintiff herein, who is its grantee, acquiesced in the settlement, and received, without question, patent to all other lands contained in the selection list, from which the demanded premises had been stricken, and selected other lands in lieu of the lands in controversy, and secured patent and holds title to such other lands, and that said grant has been fully satisfied and patent issued and received therefor by plaintiff. (3) By way of estoppel defendant pleads substantially the same facts recited in his previous answer, and alleges that the property is of a greater value than \$3,000; and that defendant will be greatly damaged if plaintiff is suffered to assert title to the demanded premises. (4) That he holds possession from A. N. Soliss, his lessor, alleging continuous settlement of the demanded premises by Josiah H. Chandler from 1881 to February 18, 1893, and that Chandler at the latter date filed his application for a homestead; that said application was contested by the Willamette Valley & Cascade Mountain Wagon Road Company; that Chandler was successful in said contest; that the company acquiesced in the same and selected other lands in lieu thereof, for which it received patent; that its grant is now fully satisfied; that the decision in favor of Chandler was granted April 24, 1895; that on December 26, 1904, final certificate

was issued in favor of Chandler, which was recorded in the record of deeds for Malheur County March 7, 1905; that patent to the demanded premises was issued to the heirs of Chandler on March 5, 1906, which was recorded May 8, 1906, and alleges mesne conveyances from certain of said heirs to A. N. Soliss, defendant's lessor; and that Soliss was a purchaser without notice and in good faith of the demanded premises. (5) That adverse possession is and has been in Soliss and his grantors and predecessors in interest for more than ten years next preceding the commencement of this action.

To this there is a reply, denying all the matters therein, except certain matters of record. From a judgment in favor of defendant, plaintiff appeals. **AFFIRMED.**

For appellant there was a brief over the names of *Messrs. Brooke & Saxton*, with an oral argument by *Mr. Francis M. Saxton*.

For respondent there was a brief over the names of *Mr. Charles E. S. Wood*, *Mr. Dalton Biggs*, *Mr. John W. McCulloch*, and *Mr. Albert N. Soliss*, with an oral argument by *Mr. Wood*.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

1. The first question presented in this appeal is: Did the title to the lands lying within the six-mile limit of the Willamette Valley & Cascade Mountain Wagon Road Company grant pass upon the mere filing of the company's selection list, or did it pass upon the approval of such list by the Secretary of the Interior? It is not disputed that the company filed the map of definite location of its road as to that part of it along which the land in question is situated, on July 10, 1871, and it satisfactorily appears that notice of withdrawal of said lands from entry or sale did not reach the local land office at La Grande until July 5, 1883. The evidence shows Chandler's settlement to have been instituted in 1881 and to have been continued to the present time by himself or his legal repre-

sentatives, or their grantee. Now, if the approval of the company's selection list by the Secretary of the Interior was necessary to pass title to the land, plaintiff must fail in this action, as it is clear that the Secretary rejected and struck from such list the lands in controversy here, and that they were subsequently patented to the heirs of Chandler. The identical question involved in this action was considered by this court in the case of *Altschul v. Clark*, 39 Or. 315 (65 Pac. 991), which was an action involving the construction of the terms of this very grant. In that case it was held by the court that no title passed until the selection had been approved by the Secretary of the Interior. Counsel for plaintiff frankly admit in their brief that, if that case is to be upheld, they must fail in their present contention. That case was fully presented, and the opinion by Mr. Justice WOLVERTON shows careful research and consideration, and we are satisfied that it correctly states the law in relation to the grant in question, and therefore we still adhere to the doctrine therein announced, so far as it relates to the date that title passed from the United States to the wagon road company.

The recent decision in the case of the *Eastern Oregon Land Co. v. Brosnan* (C. C.) 147 Fed. 807, is greatly relied upon by counsel for plaintiff in their argument in this case, and some stress is laid upon the fact that Judge WOLVERTON who rendered the opinion in the case of *Altschul v. Clark*, 39 Or. 315 (65 Pac. 991), after further investigation of the law on the federal bench, arrived at a different conclusion from that reached by him in that case. But the difference of a single phrase in the two acts makes the cases as wide apart as the poles. The granting clause in the act of Congress depended upon in the case of the *Land Company v. Brosnan* reads as follows:

"There be and is hereby granted alternate sections of public land designated by odd numbers, three sections

per mile on each side of said road." Act Feb. 25, 1867, c. 77, 14 Stat. 409.

The grant for the Willamette Valley & Cascade Mountain Wagon Road Company reads:

"There be and is hereby granted alternate sections of public land designated by odd numbers, three sections per mile to be selected within six miles of said road."

In the first grant the law selects and designates. Nothing is left to fix the grant, but merely filing a map of definite location. It is a grant in place, a definite location of the road being sufficient to fix and identify it, and the learned judge very properly held that title passed upon such definite location. *Altschul v. Clark*, 39 Or. 315 (65 Pac. 991); *Wisconsin R. R. Co., v. Price County*, 133 U. S. 496 (10 Sup. Ct. 341; 33 L. Ed. 687). But in the grant under consideration the words "to be selected" are added to the word "designated." Here is no grant in place. Here some agency must select before the grant becomes fixed. Was it the intention of Congress that selections should be made and patent pass without any official supervision by the Government in its own behalf or the interest of its citizens? We think not. Lands to the extent almost of empires have been granted to the very limit of profusion and recklessness to aid railroads and wagon roads, but it is inconceivable that it was the intention of Congress to make the recipient of so generous a grant as this, the sole judge of what it had a right to take without a shadow of governmental supervision. The difference in the result reached in the case of *Altschul v. Clark* and *Eastern Oregon Land Company v. Brosnan* arises through a radical difference in the terms of the grant; one being a grant in place and the other a floating grant, dependent upon selection. The two decisions are consistent with each other and with the law in respect to the matters heretofore adverted to.

2. In addition to this, it appears from certified copies of the list of land selected and patented by the United

States to the Willamette Valley & Cascade Mountain Wagon Road Company and its grantees, and by official communications of the Commissioner of the General Land Office and the Secretary of the Interior, made in the regular course of business of their respective office, that this grant has been completely filled and the whole matter closed. Conceding, without deciding, that the oral testimony of Col. Wood, manager of the road company, all through these proceedings was not admissible, we think these official communications under the circumstances in which they were made, are admissible, and that, taken together, they show plaintiff's grantor has already received and accepted patent to all the lands required to fill up its grant, and therefore indicate that other lands must necessarily have been selected in place of the demanded premises. This being so, plaintiff is estopped from claiming the land in question.

3. We are of the opinion that the defense of adverse possession is one that was properly interposed in this cause, and that it is fully supported by the testimony. As before stated, Chandler, from whom defendant and his grantors claim title, settled upon the land in question in 1881, and resided thereon continuously as a settler under the homestead laws until 1893, when he filed his application for a homestead. The record is silent as to the date of survey, but this is not material, as a survey had evidently been made when he filed his homestead. His application being contested by plaintiff's predecessors in interest, no final decision was reached until April 24, 1895, followed by a final certificate in his favor in 1904, and a patent to his heirs in 1906. From the date of his settlement until his death, Chandler was in open, notorious, exclusive, and adverse possession of the land, living upon, improving and cultivating the same, and claiming it adversely to every one, except the United States, and that possession and claim have been kept ever since, by his successors in interest. If plaintiff and

his successors never had notice of his adverse, hostile claim at an earlier period, they knew it from February 18, 1893—the date of his homestead application. Unless, therefore, his recognition of ultimate title in the United States prevented the statute from running in Chandler's favor, plaintiff, on his own theory, is out of court. If the wagon road grant was one *in praesenti*, and took effect, as plaintiff claims, from the date of filing its selection list, then plaintiff from that date was in a position to maintain ejectment against Chandler and his successors for more than ten years before the commencement of this action. Now, did the recognition by Chandler of superior title in the United States, operate to defeat defendant's claim of adverse possession? This question was first before this court in *Fellows v. Evans*, 33 Or. 30 (53 Pac. 491), a case very similar to the one at bar. In that case the defendant had settled upon the land, made his final proof, and received his final certificate. Subsequently, however, by some mistake or erroneous ruling of the Land Department, the land was patented to a wagon road company. Concerning defendant's claim of adverse possession, the court say: "The evidence shows and the court below found that the defendant and his grantors had been in the adverse possession of the disputed tract of land claiming title thereto as against all the world, except the United States, for more than ten years prior to such sale, which was sufficient to vest in him a perfect title as against the wagon road company." *Beale v. Hite*, 35 Or. 176 (57 Pac. 322: 58 Pac. 102), is the next case where this subject was involved, and arose under the swamp land act. The land in controversy was granted to the State by the act of Congress of March 12, 1860 (Act March 12, 1860, c. 5, 12 Stat. 3), as swamp land and conveyed by the State to the plaintiff's ancestor, November 9, 1886, though not patented to the State until 1891. In 1884 defendant settled upon it as a homesteader, claiming that it was not, in fact, swamp

land, but subject to entry as government land, but his filing was refused. Having resided on the land for more than ten years, he plead adverse possession. The court held that the evidence showed that he was a mere squatter, occupying what he believed to be government land, and that, as the government's title had passed to plaintiff, defendant's possession had not been adverse. Upon the facts the decision was clearly right. Adverse possession was not proved in the case, and what follows in the opinion must be regarded as in the nature of dictum. The opinion attempts to distinguish the case then under consideration from the case of *Fellows v. Evans*, 33 Or. 30 (53 Pac. 491), remarking that in that case and some of the California cases the defendant's possession was under a recognized claim of title and invoked in defense of a subsequently acquired title. *Fellows v. Evans* has never been expressly overruled; in fact, it was practically affirmed in *Beale v. Hite*, 35 Or. 176 (57 Pac. 222: 58 Pac. 102). In the case at bar, adverse possession has been set up in defense of the after-acquired title, and would be a good defense if the two cases last cited are good law. In a motion for rehearing the court cites *Altschul v. O'Neill*, 35 Or. 202 (58 Pac. 95), as being in accord with its views in *Beale v. Hite*, 35 Or. 176 (57 Pac. 222: 58 Pac. 102); so that it is evident there was not an intent in the judicial mind to overrule *Fellows v. Evans* in the case of *Altschul v. O'Neill*; but, on the contrary, it seems that the court was still of the opinion that adverse possession could be properly interposed in defense of an after-acquired paper title, which was the situation in the case of *Fellows v. Evans*, and is so in the case at bar, but which was not the condition presented in *Altschul v. O'Neill*, 35 Or. 202 (58 Pac. 95), nor in the case of *Altschul v. Clark*, 39 Or. 315 (65 Pac. 991), in both of which cases the plaintiff held the record title. In the two cases last mentioned, however, the court seems to lay down the general doctrine

that adverse possession cannot obtain in any case where the claimant recognizes a superior title in the United States. Both opinions are by Mr. Chief Justice WOLVERTON, and show careful research and painstaking consideration so characteristic of that learned jurist. It must be acknowledged that there is much conflict in the authorities. Even the decisions of the courts of the same state are not always harmonious. For instance in *Schleicher v. Gatlin*, 85 Tex. 270 (20 S. W. 120), which was much relied on by Mr. Justice BEAN, in *Beal v. Hite*, 35 Or. 176 (57 Pac. 222: 58 Pac. 102), has been overruled, and the opposite view expressed by the same court in *Longley v. Warren*, 11 Tex. Civ. App. 269 (33 S. W. 304). The authorities supporting the doctrine announced in *Beale v. Hite*, 35 Or. 176 (57 Pac. 222: 58 Pac. 102), and in the cases of *Altschul v. O'Neill*, 35 Or. 202 (58 Pac. 95), and *Altschul v. Clark*, 39 Or. 315 (65 Pac. 991), are cited and thoroughly commented upon in the opinions in those cases, and it is needless to discuss or cite them here. But we are of the opinion that the weight of authority both in the number of courts and in the reasoning advanced is in favor of the contention of the respondent.

In support of the conclusion herein reached, a discussion of some of the authorities bearing upon this subject seems proper under the circumstances. In *Converse v. Ringer*, 6 Tex. Civ. App. 51 (24 S. W. 705), decided in 1894, the Court of Civil Appeals of Texas held that, under their statute giving title to one who has had adverse possession of land for ten years, possession may be adverse to the true owner, though maintained under the mistaken belief that the land is vacant, and with the intention of acquiring title from the State under the homestead or pre-emption laws. It was there contended the appellee's vendor, believing the land to be vacant, having entered into and held possession thereof for ten years, intending to acquire title from the State, that his

holding was not adverse to the true owner. Mr. Chief Justice FISHER in deciding the case says: "The position taken by appellant upon this question finds support in the following cases decided by the courts of this State: *Schleicher v. Gatlin*, 85 Tex. 270 (20 S. W. 121); *Norton v. Collins*, 1 Tex. Civ. App. 275 (20 S. W. 1113); *Lumber Co. v. Ballard* (Tex. Civ. App.), (23 S. W. 921). The first case cited relies for authority on the case of *Mhoon v. Cain*, 77 Tex. 317. This case is more fully reported in 14 S. W. 24, where the facts are given, and, from an inspection of the case, it will appear that the question now before us was not decided by the court. The decision rested upon the ground that the party in possession held the land with a view to purchase it from the true owner when it was ascertained who he was, and that he made inquiry for the owner with the purpose of buying the land. He and one Stone had agreed that they would join in the purchase of the land from the owner. The court held that possession under such circumstances was not adverse to the owner. The second case cited relies upon the case of *Schleicher v. Gatlin*, and the third case noted, cites no authority to support it. In neither of these cases are any reasons given or stated for the rule they announce; and we apprehend that it would be an exceedingly difficult undertaking to give a reason that could justify the rule, or to find any principle of law as a basis for its support. It is true that limitation will not run when the land is vacated, and title remains in the State; but such is not the case here, and we can perceive no good reason why one in possession of land under the mistaken belief that it is vacant, asserting an exclusive and adverse claim, having the exclusive use and enjoyment of it under a claim that it is hostile to the true owner, may not rely upon such possession in order to prescribed under the ten-year statute. Naked possession in hostility to the claim of the true owner is sufficient as a basis for recovery under this statute. *Craig v. Cart-*

wright, 65 Tex. 417. Possession is not required to be adverse to the world, but it is only needful that it be adverse to the true owner, or one claiming adversely to the defendant." In *Cartwright v. Pipes*, 9 Tex. Civ. App. 309 (29 S. W. 690), it was held by the same court that a person asserting an adverse claim to land of which he had been in the exclusive occupation for ten consecutive years, claiming in hostility to the true owner, can recover it though he acts under the mistaken belief that it is vacant public land. Mr. Chief Justice GARRETT, who wrote the opinion in the case of *Schleicher v. Gatlin*, in speaking of the decisions in that and certain other cases, says: "We shall not review them, and only say that, under the facts in *Schleicher v. Gatlin*, the decision of that case was right, and that the question was not involved in the decision of the other cases. Our opinion is that the fact that a person in possession of land belonging to another believes that it is public land should go to the jury as any other fact showing intent in order to determine the character of the possession." So, too, in *Longley v. Warren*, 11 Tex. Civ. App. 269 (33 S. W. 304), the same court held that one who settles on land erroneously believing it to be vacant public land, and expecting to acquire it under the homestead law, may, by such occupancy, acquire title by adverse possession against the true owner. Mr. Justice STEPHENS, alluding in the opinion to the case of *Schleicher v. Gatlin*, says: "We do not, therefore, feel constrained by that decision to approve a judgment which seems to us to be clearly erroneous." The power of the Court of Civil Appeals to overrule a decision rendered by the Supreme Court of Texas may well be doubted; yet the criticism of the doctrine promulgated, having originated in that State, though in an inferior court, is certainly entitled to some consideration, particularly so as it is participated in by the author of the opinion in the principal case. "Adverse possession," as defined by Rev. St. 1879, Article

3198, "is an actual and visible appropriation of the land commenced and continued under a claim of right inconsistent with and hostile to the claim of another." It is also provided that the statute of limitations does not run against the State. Rev. St. 1879, Article 3200. "Whenever in any case the action of a person for the recovery of real estate is barred by any of the provisions of this chapter, the person having such peaceable and adverse possession shall be held to have full title, precluding all claims." Rev. St. 1879, Article 3196.

It is held in *Bridges v. Johnson*, 69 Tex. 714 (7 S. W. 506), that the adverse holding of land for the period of ten years invests the possessor with a title as absolute as if acquired by patent from the State, on which he may sustain an action of trespass to try title. See, also, *Branch v. Baker*, 70 Tex. 190 (7 S. W. 808). In *Clemens v. Runckel*, 34 Mo. 41 (84 Am. Dec. 69), it was held that a party's possession is adverse to the true owner where he owns and holds actual, open, uninterrupted, and notorious possession of land to which he expects to acquire a title by pre-emption whenever it shall be brought into market. Mr. Justice BATES, speaking for the court, says: "The defendant and those under whom he claims did not enter or hold under the plaintiff. They did not recognize his title. They had no privity with him. They do not appear even to have known of the existence of his title. They recognized a title in another person (the United States), who was supposed to be the proprietor; and, as to the United States, their possession was not hostile; but they did expect to acquire the title of the United States, believing themselves to have a right of pre-emption to the exclusion of all other persons, and a present right to the use and possession of the land." "The defendants, though without title," says Mr. Justice HOLMES, in *Gibson v. Chouteau's Heirs*, 39 Mo. 536, "were in possession under claim of title and with an expectation of obtaining the title from the United

States. The possession of one with the intention to acquire right of pre-emption has been held to work a disseisin of all but the sovereign." The statute of Missouri provides that a possession under color of title of a part of a tract of land in the name of the whole, and exercising during the time of such possession the usual acts of ownership over the whole tract so claimed, is deemed a possession of the whole tract. Rev. St. Mo. 1889, § 6768. It also declares that the statute of limitations does not extend to any lands belonging to the State. Rev. St. Mo. 1889, § 6772. In *Barry v. Otto*, 56 Mo. 177, it is held that ten years' adverse possession is not only a bar to the statute of limitations, but it creates in the possessor an affirmative title under which he may maintain ejectment, and that such possession raises a presumption that the title has emanated from the Government, and is vested in the holder. See, also, *Davis v. Thompson*, 56 Mo. 39. In *Page v. Fowler*, 28 Cal. 605, it is held that, to constitute adverse possession of public land, it is sufficient if the party in possession, and claiming that his possession is adverse as against a prior possessor, claims the right to possession as against all the world, except the United States. "It is requisite," says Mr. Justice RHODES, in *Hayes v. Martin*, 45 Cal. 559, "that a party who relies upon the statute should show that he claims title in hostility to the United States. He may admit title in the United States, either with or without a claim on his part of the right to acquire the title from the United States, and it is sufficient if he has such possession as is required by the statute, and claims in hostility to the title which plaintiff establishes in the action." In California the statute prescribes what shall constitute an adverse holding of real property under a claim or color of title. Deering's Code Civ. Proc. § 323 *et seq.* It is also held in that State that an adverse possession of land for the statutory period vests the occupant with an absolute title thereto. *Simson v. Eckstein*,

22 Cal. 580; *Arrington v. Liscom*, 34 Cal. 365 (94 Am. Dec. 722); *Cannon v. Stockmon*, 36 Cal. 535 (95 Am. Dec. 205); *Morris v. De Celis*, 51 Cal. 56; *Pacific Life Ins. Co. v. Stroup*, 63 Cal. 150; *Johnson v. Brown*, 63 Cal. 391. To the effect that a possession of land in subordination to the title of the United States may be adverse as to another claimant, see *McManus v. O'Sullivan*, 48 Cal. 7; *Lord v. Sawyer*, 57 Cal. 65; *Francona v. Newhouse* (C. C.) 43 Fed. 236; *Northern Pac. Ry. Co. v. Kranich* (C. C.) 52 Fed. 911; *Rathbone v. Boyd*, 30 Kan. 485 (2 Pac. 664); *Moore v. Brownfield*, 7 Wash. 23 (34 Pac. 199). It has been held that the possession of land by one who recognizes the title of another thereto, may nevertheless constitute an adverse holding as against the true owner. *Skipwith v. Martin*, 50 Ark. 141 (6 S. W. 514); *Unger v. Mooney*, 63 Cal. 586 (49 Am. Rep. 100); *Johnson v. Gorham*, 38 Conn. 513; *Clark v. Gilbert*, 39 Conn. 94; *Portis v. Hill*, 14 Tex. 69 (65 Am. Dec. 99); *Elliott v. Mitchell*, 47 Tex. 445; *Pearson v. Boyd*, 62 Tex. 541. In *Mather v. Walsh*, 107 Mo. 121 (17 S. W. 755), it is held that the assertion of title by an occupant as against the plaintiff in the action is sufficiently adverse as to him to start the limitation. It need not be an assertion of claim "against all the world." "Actual, uninterrupted, and notorious possession under a claim of right," says Mr. Justice ANDERS, in *Moore v. Brownfield*, 7 Wash. 23 (34 Pac. 199), "is sufficient without color of title; and such possession need not be adverse to all the world." In *Marshall v. McDaniel*, 12 Bush. (Ky.) 378, it is held that a continued, actual, adverse holding for a period of nearly 35 years perfects the title to land against all the world, unless it be the commonwealth. The adverse holding need not be against the whole world to put the statute of limitations in motion, but the term is used to impart notice; for, if the owner has not actual knowledge that some person has entered upon his premises, the possession of the latter must be

of such a character as to be constructive notice to all the world, on the theory that the owner has left some person in charge who will notify him if his rights are being invaded. *Close v. Samm*, 27 Iowa, 503; *Teabout v. Daniels*, 38 Iowa, 158; *Poignard v. Smith*, 6 Pick. (Mass.) 172; *Alexander v. Polk*, 39 Miss. 739; *Turpin v. Saunders*, 32 Grat. (Va.) 27; *Cook v. Babcock*, 11 Cush. (Mass.) 206. The statutes of California, Missouri, and Texas do not, in our judgment, so materially alter the common-law doctrine of adverse possession as to render necessary a different rule of interpretation in this State from that which prevails in those jurisdictions. The latest decisions of the Supreme Court of the United States rendered in cases having many features similar to the case at bar should of themselves, in our judgment, justify this court in overruling and receding from the doctrine enunciated in *Altschul v. O'Neill*, *Altschul v. Clark*, and *Beale v. Hite*, so far as they conflict with the views herein announced. *Missouri Land Co. v. Wiese*, 208 U. S. 234 (28 Sup. Ct. 294: 52 L. Ed. 466); *Missouri Land Co. v. Wrich*, 208 U. S. 250 (28 Sup. Ct. 299: 52 L. Ed. 473); *Iowa R. R. Co. v. Blumer*, 206 U. S. 482 (27 Sup. Ct. 769: 51 L. Ed. 1148). In view of the authorities here cited, and especially in the light of the views so lately expressed by the highest tribunal of the nation, we now hold that one claiming title to land by adverse possession for a period of ten years as against all persons, but recognizing the superior title of the United States Government, and seeking in good faith to acquire that title, may assert such adverse possession as against any person claiming to be the owner under a prior grant. Holding these views, we are of the opinion that the judgment of the court below should be affirmed; and it is so ordered. AFFIRMED.

MR. JUSTICE KING, having been of counsel, did not sit in this case, nor take part in its decision.

Decided June 8, 1909.

BARDE v. WILSON.

[102 Pac. 801.]

APPEAL AND ERROR—NOTICE ON APPEAL IN OPEN COURT.

1. The abstract on appeal, showing verdict was rendered November 9th (by mistake for December 9th), contained a journal entry that on December 19th plaintiff's motion "to set aside the verdict * * and the judgment entered thereon" was denied, and thereupon plaintiffs in open court gave notice; also a journal entry that on December 19th, the verdict having been returned that day, judgment was rendered for defendant. *Held*, that from the recital that the motion was to set aside the judgment, as well as the verdict, and the presumption that the court, as was its duty under Section 201, B. & O. Comp., as amended by Laws 1907, p. 812, § 4, gave judgment on the day verdict was returned, there was no doubt that the judgment was not given or entered December 19th, but there was a mistake in such date, so that notice of appeal in open court was not given at the time judgment was rendered, as required by Section 549, B. & O. Comp.

APPEAL AND ERROR—NOTICE OF APPEAL—NECESSITY.

2. Notice of appeal must be served in the manner and at the time prescribed by the statute to give the appellate court jurisdiction of the subject-matter; and the right to hear and determine the cause cannot be given by consent of the parties, or by the court waiving strict compliance with the statute.

From Multnomah: **EARL C. BRONAUGH**, Judge.

This is an action by M. Barde and others against J. T. Wilson. From a judgment in favor of defendant, plaintiffs appeal. Respondent files motion to dismiss the appeal.

DISMISSED.

ON MOTION TO DISMISS.

Mr. Alex Bernstein for the motion.

Mr. R. R. Giltner, *contra*.

PER CURIAM: The defendant's attorney calls attention to the transcript in this action, sent up by the clerk of the trial court, and moves to dismiss the appeal on the ground that the notice was not given at the proper time. The plaintiffs' attorney relies upon a stipulation of the parties, wherein it is specified that the appeal shall be tried on a printed record, and maintains that, according to the terms of the agreement, an abstract was served on the adverse party and filed in this court; that the synopsis

filed shows that a notice of appeal was given in open court when the judgment was rendered; that upon service of the abstract, if the defendant's attorney had considered it imperfect or unfair, and desired to file an amended abstract, he had ten days in which to do so (Rule 5 of the Supreme Court, 50 Or. 572: 91 Pac. viii); that he did not take advantage of this right, and, by reason thereof, is estopped to dispute the correctness of the statements contained in the abstract filed—and especially so, when no motion to dismiss the appeal was made until after the time for serving another notice had expired.

1. It is manifest from the abstract that a verdict for the defendant was given November 9, 1908, and that a motion to set aside the verdict and for a new trial was filed the next day and overruled December 19, 1908. The entry made in the journal at that time, omitting the immaterial parts, is as follows:

"Now, at this time, this cause coming on to be heard (on) the notice filed herein by plaintiffs to set aside the verdict of the jury heretofore returned in the above-entitled action and the judgment entered thereon, and to grant plaintiffs a new trial, * * and the court having heard the arguments of counsel for and against the motion, and being fully advised in the premises, it is ordered that said motion be and the same is hereby denied. Thereupon counsel for plaintiffs in open court gave notice of appeal from the judgment entered herein in favor of the defendant and against the plaintiffs, and from the whole thereof, to the Supreme Court of the State of Oregon. (Signed) Earl C. Bronaugh, Judge."

Immediately after the entry noted, the following statements appear in the abstract, to-wit:

"And afterwards, on the 19th day of December, 1908, it being the 12th day of said term, the following judgment was rendered (omitting title). 'Now, at this time, this cause coming on to be heard, on motion of counsel for defendant for judgment on the verdict, and it appearing to the court that the jury duly impaneled in the

above-entitled cause, has on this day returned into open court their verdict in favor of the defendant and against the plaintiffs, in the sum of \$472.90. It is, therefore, considered and ordered by the court that the defendant do have and recover of and from the above-named plaintiffs the sum of four hundred seventy-two and 90-100 (\$472.90) dollars, and for his costs and disbursements in this action allowed and taxed at \$53.95, and that execution issue therefor.

(Signed) Earl C. Bronaugh, Judge.'''

The abstract, so far as essential, concludes as follows:

"Plaintiffs at this time by their attorneys * * gave notice in open court that the plaintiffs appeal from the above judgment and from the whole thereof to the Supreme Court of the State of Oregon, which said appeal is hereby allowed. Dated this 19th day of December, 1908."

A party to a judgment in any action, desiring to appeal therefrom, may, by himself or attorney, give notice in open court at the time the judgment is rendered that he appeals from the decision or from some specified part thereof to the court to which the appeal is sought to be taken. Section 549, B. & C. Comp. When a trial has been had by a jury, judgment shall be given by the court in conformity with the verdict and so entered by the clerk within the day on which the verdict is returned. Section 201, B. & C. Comp., as amended by Laws 1907, p. 312, § 4.

The abstract states that the verdict was returned November 9, 1908, but an error was undoubtedly made in naming the month. It should have been December. As the judgment was required to be given and entered within the day on which the verdict was returned, the oral notice of appeal could have been given only on December 9, 1908. The first journal entry hereinbefore set forth states that the motion, which was overruled December 19, 1908, was invoked "to set aside the verdict of the jury heretofore returned in the above-entitled action and the judgment entered thereon"; thus impliedly

showing that the judgment had been entered prior to the denial of the motion for a new trial. The second journal entry quoted contains the following finding:

"And it appearing to the court that the jury duly impaneled in the above-entitled cause has on this day returned into open court their verdict," etc.

It thus inferentially appears that the judgment was given and entered, as by law required, on December 9, 1908. The recitals to which attention has been called, supplemented as they are by the presumption that official duty has been regularly performed, leave no doubt that the judgment rendered on the verdict was not given or entered December 19, 1908, as stated in the abstract, so that, relying upon the abstract alone, we must conclude that the day of the month thus stated was erroneously given.

2. The proper giving of a notice of appeal relates to jurisdiction of the subject-matter, in that it must be served at the time and in the manner prescribed by statute, which is a grant of sovereign power. This right to hear and determine a cause cannot be conferred by consent of the parties, nor can a strict observance of the requirements of a statute be waived by a court.

Since the notice of appeal, which was oral, was not given at the time the judgment was rendered, it follows that the appeal ought to be dismissed, and it is so ordered.

DISMISSED.

Argued February 10, decided March 9, rehearing denied April 27, 1909. Costs retaxed June 8, 1909.

LITHERLAND v. COHN REAL ESTATE CO.

[100 Pac. 1; 102 Pac. 308.]

MECHANICS' LIENS—AGREEMENT OR CONSENT OF OWNER.

1. Under Section 5640, B. & C. Comp., providing that every contractor shall have a lien for the work done in the construction of the building at the instance of the owner or his agent and that every architect having charge of the construction of a building shall be deemed the agent of the owner, a contractor claiming a lien must show a contract with the owner, or with his

authorized agent, and a contractor relying on a contract with an architect employed only to make plans, under an agreement for compensation if the owner proceeds with the construction of the building, is not entitled to a lien, where the owner had decided not to erect the building.

COSTS—ON APPEAL—UNNECESSARY MATTER.

2. Under Supreme Court rule 9, 50 Or. 574 (91 Pac. IX), requiring the abstract of the record to contain so much of the complaint, etc., involved in the appeal, as may be necessary to explain the questions raised, costs will not be allowed for the printing of pleadings having no bearing on the issues on appeal and unnecessarily included in the abstract.

COSTS—ON APPEAL—TRANSCRIPT OF EVIDENCE—CARBON COPY.

8. Under Supreme Court rule 8, 50 Or. 573 (91 Pac. IX), providing that "in equity cases the brief shall contain such portion of the evidence as may be deemed material * * in either narrative form or by question or answer," the expense of a carbon copy of the transcript of evidence on appeal is not a proper disbursement.

From Multnomah: ARTHUR L. FRAZER, Judge.

Statement by MR. JUSTICE EAKIN.

This is a suit by F. L. Litherland against the S. Morton Cohn Real Estate & Investment Company, to foreclose a mechanic's lien. In December, 1906, defendant contemplated the erection of a six-story building on the northwest corner of Eleventh and Washington streets, Portland, Oregon, and accordingly employed Emil Schacht as architect therefor. The contract between defendant and Emil Schacht provides that as defendant is to erect a six-story building, and Schacht is to be the architect of the same, it is agreed that, if the bids received by Schacht for the erection of the building should exceed \$130,000 for its total cost, the defendant is to have the privilege of declining to build, and provides what fees Schacht is to have in case defendant does not proceed with the building, and what, in case it does build, and that defendant reserves to itself the right of directing, through its representatives, all work and maintain control of the same. Bids for the concrete and grading work were received by Schacht on February 16, 1907, and plaintiff was the lowest bidder therefor, at the price of \$6,500. Defendant declined to make any contract for the grading and cement work until all the bids should be received, that it might know the total cost. The bids

for the balance of the structure were taken March 6, 1907, and defendant declined to proceed with the erection of the building, because the bids ran too high. The testimony on behalf of plaintiff tended to show that Schacht stated to plaintiff that his bid was the lowest and directed him to proceed with the work. Schacht, however, denies that he directed him to proceed. Plaintiff immediately began excavating and performed work to the amount of \$603, when he was directed to stop, and he thereupon filed a notice of lien upon the property for said amount, and brought this suit to foreclose the same. Defendant answered the complaint. The cause was tried, and the court made findings in favor of plaintiff and rendered a decree thereon, from which defendant appeals.

REVERSED: SUIT DISMISSED.

For appellant there was a brief over the names of *Messrs. Bernstein & Cohen*, with an oral argument by *Mr. Alex Bernstein*.

For respondent there was a brief over the names of *Messrs. Cake & Cake*, with an oral argument by *Mr. William M. Cake*.

MR. JUSTICE EAKIN delivered the opinion of the court.

1. To establish a mechanic's lien upon a lot or building, the claimant must connect himself with the owner, either by showing that the claimant contracted with the owner or his agent (Section 5640, B. & C. Comp.), or that he performed the work for one who was erecting the building with the owner's consent (Section 5643). Section 5640, B. & C. Comp., provides that every mechanic, contractor, and laborer, performing labor in the construction of a building, shall have a lien thereon for the work done, at the instance of the owner of the building or his agent; and every contractor, architect, or builder, having charge of the construction of the building, shall be held to be the agent of the owner, for

the purposes of this act. Plaintiff contends that the architect was the agent of the owner in this case in making the contract with plaintiff, but we find in the record no authority for the architect to make contracts for the erection of a building; but the architect's contract with defendant related only to the plans and his compensation and matters relating thereto, in case defendant proceeded with its construction. It is held in *Rankin v. Malarkey*, 23 Or. 593 (32 Pac. 620; 34 Pac. 816), that the claimant must connect himself with the owner of the property by contract, by showing that the claimant contracted with the owner or his agent. So far as that case requires that fact to be stated in the notice of lien, it is overruled in *Osborn v. Logus*, 28 Or. 302 (37 Pac. 456; 38 Pac. 190; 42 Pac. 997); but otherwise it is followed. In that case Judge WOLVERTON says: "Whether the person for whom the labor is done or to whom the materials are furnished was an agent under the statute, or had authority to bind the owner, and entitle the laborer or material man to a lien, is a matter of pleading and proof at the trial." This was again affirmed in *Smith v. Wilcox*, 44 Or. 323 (74 Pac. 708; 75 Pac. 710), in which Judge WOLVERTON says: "To facilitate the acquirement of the lien, however, the statute has made the original contractor an agent of the owner, while in charge of the construction. Necessarily he is given the primary control thereof. He may authorize some other person to superintend or take the management of the work, or the parties may agree that an architect or a special builder shall be in charge; but unless there is some such provision to shift the supervision he is necessarily intrusted with it. Being in entire charge therefore of the construction, he may subject the building to a lien by the employment of any person to perform labor or furnish material therefor. * * The principle upon which mechanics' liens are upheld, where they are given to persons other than those contracting directly

with the owner, is that the contractor becomes, for the purpose of the statute, an agent of the owner, and thus do all such persons indirectly contract with the owner."

The plaintiff does not claim as a laborer or sub-contractor, but as an original contractor with the owner, and to entitle him to a lien he must show a contract directly with the owner, made by an agent having authority to bind the owner; but the defendant did not at any time decide to erect the building or give any one authority to contract with relation thereto. The architect was not authorized to make the contract for the construction of the building and could make none that would bind the owner, and therefore the plaintiff has no contract with the defendant or lien upon its property.

The decree of the court below will be reversed, and suit dismissed.

REVERSED: SUIT DISMISSED.

Decided June 8, 1909.

ON MOTION TO RETAX COSTS.

[102 Pac. 308.]

MR. JUSTICE EAKIN delivered the opinion of the court.

2. Three items of cost were objected to by plaintiff: (1) "Printing abstract of record, \$22.00," for the reason that it contains 10 pages of unnecessary matter; (2) "cost of transcript of testimony, \$37.80," for the reason that the actual sum paid therefor was \$28.50; (3) "printing brief, \$83.00," for the reason that the testimony is printed in full, containing 40 pages more than was necessary. The clerk sustained these objections, and the defendant moves the court to retax the costs. Rule 9 of this court (50 Or. 574: 91 Pac. ix) requires that the abstract shall contain so much of the complaint, answer, motions, and demurrers, and rulings thereon, if involved in the appeal, and the judgment or decree, as may be necessary to explain the questions raised on the appeal. In this case the abstract contains the pleadings in full, with the

verifications, decree, and notice and undertaking on appeal.

But two issues were involved on the appeal: The ruling on demurrer to defendant's cross-complaint setting up a claim for damages, which seems to have been afterwards abandoned; and the authority of Schacht, as architect, to bind the defendant by a builder's contract. The portion of the complaint relating to the lien and the statement of relief sought and verification thereto, the demurrer to the complaint and ruling thereon, had no bearing upon these issues, and were unnecessarily included in the abstract. Also, the decree, notice, and undertaking on appeal were improperly included, making ten pages of unnecessary printing.

3. Defendant admits that the transcript of evidence cost only \$28.50, but claims the additional \$9.45 was paid for a carbon copy thereof. This is not a proper disbursement. Rule 8 (50 Or. 573: 91 Pac. ix) provides that "in equity cases the brief shall contain such portion of the evidence as may be deemed material * * in either narrative form or by question and answer." This allows some latitude and discretion for the attorney as to what is necessary and the form in which it shall be printed. The testimony of Emil Schacht and of the plaintiff's direct and cross-examination, and two or three pages of Schacht's testimony on rebuttal, were material, although this might have been abbreviated to some extent. That, however, was in the discretion of the attorney; but there are about 23 pages of the evidence, the printing of which was unnecessary and improperly charged as disbursements.

We will disallow \$23 of the charge for printing the brief, deducting from the cost bill \$42.45 in all, and retaxing the cost bill at \$138.10.

REVERSED: DISMISSED: COSTS RETAXED.

Argued May 8, decided June 8, 1909.

RAFFERTY v. DAVIS.

[102 Pac. 306.]

TAXATION—SALE FOR NONPAYMENT OF TAX—EVIDENCE AS TO VALIDITY.

1. One who claims as assignee of a certificate of a sale of property for nonpayment of taxes made to the county, and not by certificate or deed made to himself as a direct purchaser, has the burden of showing every requisite of a valid sale or of bringing himself within the provisions of some valid curative statute, and must prove advertisement for the period required by law.

TAXATION—SALE FOR NONPAYMENT OF TAX—NOTICE OF SALE—PROOF OF PUBLICATION.

2. Under a statute requiring that the affidavit of publication of notice of sale for taxes shall be made by the printer, his foreman, or principal clerk, an affidavit by one who styled himself "Foreman of the Eastern Oregon Republican" is insufficient, where there is nothing to show that the person making the affidavit was the foreman of the printer, or what department of the work he was foreman of.

TAXATION—SALE—NOTICE—PUBLICATION—PROOF.

3. Where the affidavit to prove publication of a notice of a tax sale is sworn to before a notary who fails to attach his official seal, the affidavit is worthless.

TAXATION—SALE FOR NONPAYMENT OF TAX—PUBLICATION OF NOTICE—CURATIVE ACT.

4. There can be no valid sale of land for nonpayment of taxes where there is no valid advertisement of the sale, and it is not within the power of the legislature, by a curative act, to avoid such defect, and thereby take one person's property and give it to another.

ABATEMENT AND REVIVAL—MATTER IN BAR AND ABATEMENT—ORDER OF PLEADING—WAIVER.

5. In an action by a landowner to recover lands held under a tax title, the defense that no tender of taxes paid has been made by plaintiff, comes too late after pleading in bar, as the plea in bar waives the matter in abatement.

TAXATION—ACTION TO TRY TITLE—MEASURE OF DAMAGES—INJURIES TO PROPERTY—DETENTION FOR LOSS OF USE.

6. The measure of damages to a landowner on recovering possession from one who holds under a void tax title, is the rental value of the land as improved by the purchaser, deducting therefrom the reasonable market value of any permanent improvements placed on the land by the purchaser.

From Union: JOHN W. KNOWLES, Judge.

Statement by MR. JUSTICE MCBRIDE.

This is an action in ejectment brought by Rachel J. Rafferty, an insane person, by A. D. Buzzard, her guardian, against A. B. Davis to recover certain lands in Union County.

The complaint alleges that plaintiff was on the 22d day of April, 1896, duly declared insane by the county court of Union County, and committed to the Oregon State Insane Asylum; that on September 24, 1907, A. D. Buzzard was duly appointed guardian; that at all dates before mentioned, and up to the commencement of this action, plaintiff was the owner in fee and entitled to the possession of the demanded premises; that for more than six years defendant has been, and now is, wrongfully and unlawfully in possession of the demanded premises, using and occupying the same; and that the reasonable value of such use and occupancy is \$150 per year. Plaintiff prays judgment for the property and the sum of \$900 damages.

Defendant answered, admitting the allegations as to the insanity of plaintiff and the appointment of her guardian, and denying generally every other allegation in the complaint, except as otherwise alleged in the answer. Defendant makes two further and separate defenses: (1) That during the year 1895 plaintiff, under the name of Rachel Rafferty, was the owner of the record title to the demanded premises; that they were regularly and legally assessed to her by the assessor of Union County, Oregon, for the year 1895, and the taxes thereon for that year were duly and regularly levied by the county court; that such taxes were never paid, but became delinquent, and were extended upon the delinquent tax roll of such county, with the costs charged thereon as delinquent, and, as such, were so returned by the sheriff; that thereafter the delinquent tax roll was returned to the sheriff with a warrant attached thereto, in due form, commanding him to make such taxes and costs by levy and sale of the lands; that thereafter the sheriff levied upon the lands, and duly and regularly advertised and offered them for sale at public auction, and duly and regularly sold the same to Union County on the 26th of February, 1897, for the

sum of \$13.70, that being the highest sum bid; that there has been no redemption of such lands, and that the time for redeeming them has long since expired; that on the 16th of August, 1899, Union County, acting through its board of county commissioners, in consideration of the sum of \$13.70, duly assigned, transferred, and set over, and caused to be assigned, transferred, and set over, its certificate of sale of the lands issued to it as purchaser at the tax sale, and authorized defendant to take and hold possession thereof under the certificate and assignment, and that he now holds possession thereunder; that by virtue of the facts aforesaid, Union County became the owner of the legal title to such lands in trust for defendant on July 1, 1901, and defendant has been at all times, and now is, the equitable owner and entitled to the possession of the same. (2) A repetition of the first answer, and further alleging the regular payment of taxes to 1907, amounting in all to \$76.98, and that plaintiff has never tendered, paid, or offered to pay the sum or any part thereof into the court with her complaint or otherwise. (3) Repetition of the first answer, and also alleging that in 1899 the premises, when defendant entered thereon, were wild, uninclosed, unimproved, rocky, and hilly, and without running water, and of no value, except for pasture purposes when inclosed with adjacent lands containing water; that since entering on the lands defendant has in good faith placed permanent improvements thereon, consisting of a mile of good substantial fence, inclosing the land, and of the value of \$200. The reply consists of a general denial.

AFFIRMED.

For appellant there was a brief over the names of *Mr. Lewis J. Davis* and *Mr. Thomas H. Crawford*, with an oral argument by *Mr. Crawford*.

For respondent there was a brief and an oral argument by *Mr. Daniel W. Sheahan*.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

1. The plaintiff was the owner of the demanded premises in 1895, when the assessment or attempted assessment was made. The description, while not very definite, was perhaps sufficient to escape the censure of being entirely void. We may concede, therefore, without deciding, for the purposes of this opinion, that the land was properly described and listed for the purpose of taxation. The tax sale in question and the proceedings under it took place before the enactment of the statute of 1901 (Laws 1901, p. 242), and are to be considered in view of the laws in relation to assessments and taxation as set forth in chapter 17, 2 Hill's Ann. Laws, except as subsequent curative statutes may have affected the laws in force before 1901, and also in view of the statute of 1893 (Laws 1893, p. 28), authorizing the county judge to bid in property offered for sale for delinquent taxes. The defendant, claiming under the assignment of a certificate of sale made to the county, and not by the certificate or deed made to himself as a direct purchaser, has the burden cast upon himself of showing every requisite of a valid sale, or of bringing himself within the provisions of some valid curative statute. *Ayers v. Lund*, 49 Or. 303 (89 Pac. 806: 124 Am. St. Rep. 1046), and cases there cited. To have been a valid sale, there must have been proof of advertisement for the period required by law.

2. The only proof offered on this subject was the affidavit of M. F. Davis, who styled himself "Foreman of the Eastern Oregon Republican." The law respecting publication of notices requires that the affidavit of publication shall be made by the printer, his foreman, or principal clerk. There is nothing to show that Davis was foreman of the printer, or, in fact, to show what department of the work he was foreman of.

3. In addition to this, the affidavit professes to be sworn to before M. F. Davis, notary public, but there is

no notarial seal attached, and, under such circumstances, the affidavit is worthless. 29 Cyc. 1096, 1097; *Tunis v. Withrow*, 10 Iowa, 305 (77 Am. Dec. 117); *Stephens v. Williams*, 46 Iowa, 540; *Pitts v. Seavey*, 88 Iowa, 336 (55 N. W. 480).

4. If there was no valid advertisement, there could be no valid sale, and therefore no title ever passed, and it is not in the power of the legislature, under the pretense of a curative act, to take one person's property and give it to another. The whole proceedings from the assessment to the final sale are more or less defective and irregular, the officers seeming to proceed upon the theory that all that was necessary in the premises was to come somewhere within gunshot range of the statutes; but it is not necessary to notice or point out these defects, those we have already mentioned being sufficient in our judgment to render the sale invalid and incapable of being made valid by any curative statute.

5. The facts disclosed in this very case furnish abundant justification for the strictness required by the courts in respect to tax sales. Here the plaintiff is a woman, who during all the period allowed by law for the redemption of her property was confined in an insane asylum without a guardian, and while so confined the defendant, who owned adjoining property, purchased the county's certificate of sale, and now seeks to hold her property. In view of the probable occurrence of just such cases, a strict compliance with the tax laws ought to be required. The defense that no tender of taxes paid by plaintiff was made in this case comes too late. It was matter in abatement of this action. A failure to tender back taxes would not defeat plaintiff's right to recover. It would only abate her action and require her to make the tender before she could begin her action again. Having plead matter in bar, the matter in abatement is deemed waived. *Hopwood v. Patterson*, 2 Or. 49; *Oregon Central R. R. Co. v. Scoggin*, 3 Or. 161.

6. Exception was also taken to the instruction of the court in regard to the measure of damages. The court, after instructing the jury that defendant had failed to prove any title or right of possession of the demanded premises, and directing a verdict in favor of plaintiff, said:

"The only question for you to consider, in making up your verdict, is the amount of damages which plaintiff is entitled to for defendant's withholding the said land during the six years prior to the commencement of this action, which may be offset to the extent of the reasonable market value of any permanent improvements, which may have been placed upon the land by the defendant, during the time he has had possession of it. (2) I instruct you that the plaintiff's measure of damages for the withholding of said land by the defendant is the reasonable rental value thereof for the purpose for which said land is adapted during the time extending back six years immediately prior to the commencement of this action."

The learned counsel for appellant contend that the true measure of damages is the rental value of the land in the condition in which appellant found it, and not the value that it acquired by reason of the fencing placed upon it by him. The evidence shows that defendant had fenced it at a total cost of about \$200; that with such fence its rental value was not to exceed \$50 per year, and without it the rental value was little or nothing. We may add that there is sufficient in the record to show that appellant's claim to the premises was *bona fide* and under color of title.

After careful review of the authorities, we are of the opinion that the rule adopted by the court below is the correct measure of damages in cases of this kind. We are not prepared to say that in cases where city lots have been built upon, and the rental value has arisen to a great extent from the actual occupation of the structure built rather than the land occupied, a different rule might not obtain, though this is doubtful. But in cases like the

present one, where the improvements are merely to enable the occupant to enjoy the natural resources of the land, we think the great weight of authority is in favor of the view that plaintiff is entitled to recover the rental value of the land, as improved, deducting therefrom the value of the improvement. As this question in its present form has not been before this court previously, we will consider some of the authorities. The case of *Southern Cotton Oil Co. v. Henshaw*, 89 Ala. 448 (7 South. 760), cited by appellant, is very instructive. This was an action to recover land and damages for withholding. The rental value, when defendant acquired the land, was \$10 per year. He erected permanent improvements of the value of \$100,000, and the rental value of the land was \$15,000 annually. Defendant was allowed nothing for improvements, and the increased rental was charged against him. The Supreme Court held this error. They say: "How shall such rents be computed? Shall it be on the land before or after the improvements?" They then cite the equity case of *Dozier v. Mitchell*, 65 Ala. 511, in which a *bona fide* purchaser was charged with the rents as the property came into his hands, and not upon the increased value caused by his improvements, and continue: "The same rule is held also to apply to actions at law, according to what we deem to be the more just view, especially where no allowance has been made the defendant for the value of his improvements. In *Jackson v. Loomis*, 4 Cow. (N. Y.) 168 (15 Am. Dec. 347), a leading case on this subject, which was trespass for mesne profits, a *bona fide* purchaser was allowed the value of permanent improvements made to the extent of the rents and profits due the plaintiff; but it was said by Mr. Chief Justice SAVAGE: 'Most clearly the defendant should not be compelled to pay an enhanced rent in consequence of his own improvements.'" The opinion then cites decisions of Indiana and Wisconsin to the same effect, and continues: "In Mississippi it is held that the defendant in posses-

sion is not to be charged with increased rent by reason of improvements made by him, and for which he has been allowed no compensation. *Phillips v. Chamberlain*, 61 Miss. 740; *Tatum v. McClellan*, 56 Miss. 352. But a distinction seems to be made where the defendant has obtained compensation for such improvements, and the plaintiff recovers against him in ejectment. *Miller v. Ingram*, 56 Miss. 510. The Supreme Court of Texas, in *Evetts v. Tendick*, 44 Tex. 570, held the defendant liable for rents on the land in its improved condition, following former decisions, but observed that the contrary rule was the more equitable. The more just rule, and the one sustained by a preponderance of authority, is believed to be that the *bona fide* occupant should not be charged with income from his own improvements, where he is so situated as not to be entitled to claim allowance for his expenditures in erecting them. * * That is this case, and we need not at present extend the principle any further." The cases cited from Iowa, Indiana, and Wisconsin are under very elaborate "occupying claimants" acts, which do not obtain in this State, but we think the law, so far as it applies to the statutes of our State, is fully and correctly stated in the opinion in *Southern Cotton Oil Co. v. Henshaw*, 89 Ala. 448 (7 South. 760). The American and English Encyclopedia of Law states the general rule as follows:

"When the occupant of land has made improvements upon it, and by so doing increased its annual value, it is a delicate question to decide what amount shall be charged him as mesne profits, since it would be unjust to demand of him profits which arose from his own improvements. The most satisfactory rule that has been evolved is that, when the occupant is allowed the prime cost of his improvements when made, he is to pay for the use and occupation of the land at its improved value." 10 Am. & Eng. Enc. Law (2 ed.) 546.

In Sutherland, Damages, the rule is thus stated:

"The improvements should be estimated in favor of defendant at such amount as they add to the market

value of the premises. The claim for them may be co-extensive in time with the allowance of rents and profits which the improvements contributed to produce. In other words, their value is not to be limited to their worth in cash at the time of the trial, but by the benefit they have conferred upon the plaintiff, whether by adding to the worth of the land at the time of its recovery, or, retrospectively, by augmenting the amount he may recover as mesne profits." 3 Sutherland, Dam. § 999.

Warville states the rule as follows:

"In fixing the amount of the rental value, the basis should be the condition of the land as improved by the defendant, if it has been so improved, where the defendant is entitled to the value of his improvements." Warville, Eject., § 540.

In *Dungan v. Von Puhl*, 8 Iowa 263, the court states the rule to be that, where the defendant is allowed the value for his improvements, he is liable for the increased rental value. The court says: "In the early settlement of the western country, the use and occupation of unimproved prairie or timber land would, as a general rule, be considered as of no value. The annual rents and profits of such land would be considered nothing. But if the land is inclosed, and put in a state suitable for cultivation and the raising of crops, not only is a value added to the land above the mere cost or value of the improvements put upon it, but the occupant may reasonably be charged a fair sum for the use and occupation of the land in its improved state, without having the right to complain that he is required to pay rent for improvements made by himself. He pays rent, not upon such improvements, but upon land worth more for the purpose for which he uses it by reason of its being brought into a state fit for cultivation. The owner is entitled to rents and profits according to the value of the land for the purpose to which it is devoted by the occupant. The occupant is to pay what the use of the land is worth to him. In such a rule we think there will

nothing be found inequitable. It does not require the occupant to pay rent on improvements made by himself. But it does require him to pay rent according to the increased adaptation of the land for the purpose for which it is used, though such adaptation has been brought about by the occupant's own labor. It is difficult to lay down a rule that will work alike fairly and equitably in all cases—of land improved by inclosure, and by being rendered suitable for the raising of crops and of an unimproved lot in a town or city. All that we can say is that the occupant is to be charged for the rents, whatever the use of the property has been worth to him, whether it be prairie land or a vacant city lot. While he has the right to claim payment for the value of his improvements, he cannot complain of being held to pay as rents and profits to the owner all that the property has been worth to him, nor in being held to the rule that the value of such rents may be increased by the labor he has placed upon it." The measure of damages stated by the court below is fully upheld by the authorities cited, and we think that the amount allowed by the jury was very moderate. Appellant was allowed the prime cost of an eight-year-old fence, and the plaintiff recovered \$165 damages, which, taking all the evidence into consideration, was a very moderate verdict.

Seeing no errors in the proceedings below, the judgment is affirmed.

AFFIRMED.

Argued May 8, decided June 8, 1909.

STATE v. MINNICK.

[102 Pac. 605.]

INDICTMENT AND INFORMATION—SUFFICIENCY—MODE OF OBJECTION—EFFECT.

1. Where the objection to an indictment for larceny is that it does not state facts constituting a crime, but no demurrer or motion to set aside the indictment was made, if, taking the indictment as a whole, the essential elements constituting the offense of larceny can be found in it, the objection must be overruled.

LARCENY—INDICTMENT AND INFORMATION—SUFFICIENCY.

2. Under Section 1808, B. & C. Comp., providing that an indictment is definite enough if the facts are so stated as to enable a person of common understanding to know what is intended, an indictment charging that defendant "took, carried, stole, led and drove away," two heifers of the value of \$80, contrary to the statutes, is sufficient to charge simple larceny without the allegation that the taking was felonious.

LARCENY—INDICTMENT—GRAND OR SIMPLE LARCENY.

3. Under Section 1801, B. & C. Comp., relating to grand larceny, and providing that any person committing the crime of larceny by stealing any "cow or calf" shall be punished, an indictment alleging that defendant took, carried, stole, led, and drove away, two heifers of the value of \$80, charges petty and not grand larceny, since the word "feloniously" is not used; "heifer" is not mentioned in the statute, and it is unnecessary, in order to charge grand larceny, to allege the value of the animal.

LARCENY—RECENT POSSESSION—INSTRUCTIONS—"FOUND."

4. In a prosecution for larceny, an instruction as to defendant being found in the recent possession of stolen property is applicable, though the property is not found in defendant's possession, but in the possession of one to whom he had sold it, since the word "found," as used in instructions of this character, simply means "discovered," "traced to," or shown to have been in defendant's possession.

LARCENY—RECENT POSSESSION—INSTRUCTIONS—CONSTRUCTION.

5. The term "recent possession," as used in an instruction in a prosecution for larceny, as to the "recent possession" of stolen property, is merely relative and depends on all circumstances of the case, and whether it is sufficiently recent to justify drawing an inference is usually a question of fact for the jury.

CRIMINAL LAW—TRIAL—INSTRUCTIONS—WEIGHT OF EVIDENCE.

6. In a larceny prosecution, an instruction that if, shortly after the theft, the property was found in the possession of defendant, and defendant has failed to explain how he obtained such possession, his failure to make such explanation may be considered as a circumstance tending to show defendant's guilt, and given such weight as seemed proper in connection with the other evidence in the case, is not erroneous as assuming a theft or as assuming that defendant's explanation was unreasonable.

CRIMINAL LAW—TRIAL—INSTRUCTIONS—REQUESTS.

7. Requested instructions covered by the general charge are properly refused.

EVIDENCE—TRANSCRIPT ON APPEAL.

8. Where it is contended that the evidence was not sufficient to justify the verdict, the transcript on appeal must show the objections to be well taken, otherwise the court will not devote the time nor occupy the space to discuss it.

CRIMINAL LAW—TRIAL—REBUTTAL EVIDENCE—ADMISSIBILITY.

9. In a larceny prosecution in which a foundation is laid for the admission of impeaching evidence by asking defendant the truth of certain admissions which he was alleged to have made, which he denied, a witness may not testify on rebuttal as to the making of such admissions, unless the evidence is limited to the purpose of impeachment, where the admissions are prejudicial to defendant and part of the state's case.

From Union: JOHN W. KNOWLES, Judge.

Statement by MR. JUSTICE MCBRIDE.

The defendant, John Minnick, was indicted, tried, and convicted in the circuit court of Union County upon an indictment charging him with the larceny of two heifers. He was sentenced to one year in the penitentiary, and, being dissatisfied, appeals.

Those portions of the indictment material to this opinion are as follows:

"John Minnick is accused by the grand jury of the county of Union and State of Oregon by this indictment of the crime of larceny of two heifers, committed as follows: The said John Minnick, on the 25th day of March, 1908, in the county of Union and State of Oregon, did then and there take, steal, and carry away and then and there take, steal, drive, and lead away, two heifers, then and there the personal property of one W. A. Ogden and said personal property then and there of the value of thirty dollars."

There was no demurrer or motion to set aside the indictment.

The court instructed the jury, among other things, as follows:

"(1) I instruct you that larceny consists in the felonious taking, stealing, and carrying away of the property of another, and if you find in the evidence in this case, beyond a reasonable doubt; that the defendant, John Minnick, in Union County, Oregon, on or about the 25th day of March, 1908, feloniously took, stole, and carried away, or drove away, the two heifers described in the indictment, or either of them, and that the heifers or either of them, at the time, were the property of one W. A. Ogden, mentioned in the indictment, and were of some value, then it will be your duty to find the defendant guilty as charged in the indictment. (2) I instruct you that if you believe from the evidence, beyond a reasonable doubt, that the animals mentioned in the indictment or either of them were stolen from W. A. Ogden, and that W. A. Ogden was the owner thereof, and that shortly after the theft the same was found in the possession of the defendant, and defendant has failed to explain how he obtained such possession, his failure

to make such explanation may be considered by you as a circumstance tending to show defendant's guilt and given such weight as you deem proper in connection with the other evidence in the case."

And, at defendant's request, the court gave the following instructions:

"(1) Where the finder of goods does not know the owner, and has nothing to indicate who the owner may be, or where he may be found, his appropriation of the goods or property will not constitute larceny. (2) To constitute larceny there must be a simultaneous combination of unlawful taking, asportation, and felonious intent. (3) I instruct you that if you find that at the time the defendant took possession of the two heifers described in the indictment, and at the time he sold them to Mr. Gale, he believed them to be his own, then it is immaterial whether he cut off a part of one of the ears, as he would have a right to do as he pleased, believing them to be his own property. (4) The fact that the defendant, after Mr. Ogden had taken possession of the two heifers, offered to buy them, is not of itself any evidence of guilt, provided he had prior to that time entertained an honest belief that the two heifers were his property, and he would have a right to buy the same of Mr. Ogden or make any settlement with him to avoid any further trouble concerning the same. (5) You should view with caution the testimony of a witness of conversations heard over the telephone, as it is evident for hearing and understanding correctly is not so good as being present and hearing a conversation. (6) I instruct you there can be no larceny of property where the defendant honestly believes the property to be his own, even though the property in controversy might belong to another. The fact of his not being the owner is entirely immaterial so long as he entertains an honest belief of his ownership."

The court further instructed the jury as to the weight of evidence and reasonable doubt, fully covering statutory requirements. The following instructions requested by defendant were refused:

"(1) I request you to return a verdict for the defendant. (2) I instruct you that if you find from the evidence

in this case that the two heifers described in the indictment came to the defendant's place with his other cattle, and that he let them run with his cattle during the winter, and took care of them with his others, and at the time they came into his possession he did not intend to steal them, but the intention to steal them came upon him later, and in pursuance to this intention, formed afterwards, he did convert the same to his own use by selling them, this would not constitute larceny, and in that case your verdict should be for the defendant. (3) I instruct you that in this case, before you can find the defendant guilty, you must be satisfied beyond a reasonable doubt that, at the time the two heifers came to the defendant's place, he then and there intended to steal them, and there must be some facts or circumstances indicating such intention other than allowing the same to run with his cattle, and the fact that he afterwards sold them is not of itself proof of an original intent to steal the said animals. (4) In order to constitute larceny, the defendant must have intended to appropriate the animals to his own use, at the time they first came into his possession, and that a conversion in pursuance of a subsequently formed intention would not make him guilty of larceny. (5) The indictment in this case alleges that the two heifers are of the value of the sum of \$30, and, the value being thus alleged, the State must prove the value as alleged, to your satisfaction beyond a reasonable doubt, before you can find the defendant guilty."

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Leroy Lomax*.

For the State there was a brief and oral arguments by *Mr. Francis S. Ivanhoe*, District Attorney, and *Mr. Andrew M. Crawford*, Attorney-General.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

1. The first objection urged by appellant is that the indictment does not state facts sufficient to constitute a crime. There was no demurrer or motion to set aside the indictment, and if, taking the indictment as a whole, the essential elements constituting the offense of larceny can be found in it, the objection must be overruled.

2. It is substantially charged that the defendant took, carried, stole, led, and drove away two heifers, contrary to the statutes. The word "feloniously" is not used in connection with taking; but, if larceny is otherwise described, the omission of that word can only go to the question of the degree of the offense, since, if it was the intent of the pleader to charge simple larceny of property of less than the value of \$35, it would be mere surplusage to charge that the act was feloniously committed. We think the words "take, steal, and drive away" are sufficient to describe larceny. Webster gives the primary meaning of the word "steal" as follows:

"To take and carry away feloniously; to take without right or leave, and with intent to keep wrongfully."

When we say of a person, "He stole a horse," we are not merely uttering a conclusion of law, but stating a fact in language that everybody, from the college professor to the common laborer, can understand. An indictment is definite enough if the facts are so stated as "to enable a person of common understanding to know what is intended." Section 1303, B. & C. Comp. Under a similar statute the Supreme Court of California has held an indictment, almost identical with the one in the case at bar, in this respect, to be sufficient to charge a felony. *People v. Lopez*, 90 Cal. 569 (27 Pac. 427).

3. The next question that arises is: What grade of larceny is described in the indictment? Section 1801, B. & C. Comp., is as follows:

"If any person shall commit the crime of larceny by stealing any horse, gelding, mare, mule, ass, jenny, or foal, bull, steer, cow, calf, hog, dog, or sheep, such person on conviction, shall be punished," etc.

It will be seen that the statute makes no mention of heifers in describing the bovine animals that are the subject of larceny, and it is objected that, as they are not specifically included, the larceny of a heifer is not grand larceny under the statute referred to. The prose-

cution contends that as a heifer is a young cow, and the indictment charges the defendant with stealing two heifers, it is equivalent to charging him with stealing two young cows. This is a question that occupied our ancient brethren of the bench, more than a century ago. In the case of *The King v. Cook*, 1 Leach (C. C.) 105, decided in 1774, wherein Cook was indicted for stealing a cow, it is stated: "The animal stolen was a female beast only two years and a half old, that had never had a calf; and a female beast of the cow kind, how old soever, if she has never had a calf, is always called an heifer." The opinion of the twelve judges of the King's bench was that the defendant could not be convicted, for the reason that the statute, upon which the indictment was founded, mentioned both "heifer" and "cow" in describing the several animals it was designed to protect, and therefore that one must be used in contradistinction to the other. It will be observed that the reason given by the court for its decision in that case does not exist in our statute, which, as before observed, does not mention heifers. In *People v. Soto*, 49 Cal. 67, an indictment for larceny of a cow was held to authorize a conviction, where the proof showed that defendant had stolen a heifer, and there are many decisions to that effect, and such is undoubtedly the law. Had the indictment in this case charged the defendant with stealing a cow, we have no doubt that a heifer, being a young cow, and therefore within that class of animals, would come within the terms of the indictment, on the theory that the greater includes the less; but we are of the opinion that, taking the indictment as a whole, it does not appear that there was an intent to indict the defendant for a felony. Under our constitution a defendant has a right "to demand the nature and cause of the accusation against him," and this certainly includes the right to be informed whether the State intends to prosecute him for a felony or for a misdemeanor. If the State intended to charge him with steal-

ing cows, it should have said so in the indictment. Instead of this, the indictment omits all reference to the terminology of the statute, omits the word "feloniously" prescribed in the forms for indictments for grand larceny, and specifies the value of the animals taken, which is necessary in petty larceny, but wholly unnecessary in grand larceny, under this section. A labored construction of this indictment might bring it within the bare technical pale of grand larceny; but we would have to say that "heifers" meant "cows," that "steal" and "feloniously took" meant the same thing, and make a new pleading by a forced and unnatural construction of the one upon which defendant was tried. We think a fair construction of the indictment is to say that it fully and clearly charges the defendant with simple larceny of property of the value of \$30.

4. Objection was made on the trial to the giving by the court of instruction No. 6, in relation to a defendant being found in the recent possession of stolen property. It is contended that the instruction was not applicable because the property was not found in defendant's possession, but in the possession of Gale, to whom he had sold it; but the word "found," as used in instructions of this character, does not mean "found by the owner." It simply means "discovered," "traced to," or shown to have been in defendant's possession. In this case the property was found, by witness McDow, in defendant's possession, in the winter of 1907, when he worked for him, and by witness Gale, when he purchased the property.

5. The term "recent possession" is merely relative and depends on all the circumstances of the case, and whether it is sufficiently recent to justify drawing an inference of guilt from it is usually a question of fact for the jury.

6. We do not agree with counsel for appellant that the instruction assumes a theft or assumes that defendant's explanation was unreasonable. The instruction was couched in the usual language used by the courts and

left the facts as to the time and manner of defendant's possession and the reasonableness of his explanation to the jury, where they properly belonged.

7. The other instructions, asked by defendant and refused, were, in our opinion, sufficiently covered by the general charge. They were not given in the language of defendant's request; but the substance of those which were proper is there.

8. It is contended that the evidence was not sufficient to justify the verdict. We have carefully gone over it as it appears in the transcript, and cannot say that it was insufficient. To take it up and discuss it at length would occupy more space than would be profitable in this opinion, and would be of no interest to any one except the defendant, and wholly unprofitable to him.

9. After the defendant had rested his case, the prosecuting witness was recalled in rebuttal, and asked concerning certain statements made to him by defendant, in regard to the cattle; among others, being an alleged statement, that the heifers had come up sucking his cows, and a foundation having been laid by putting an impeaching question to defendant on cross-examination and a denial by him of the alleged statements. This was error. The admissions sought to be proved, if actually made, were highly prejudicial to defendant, and were proper testimony in chief, and, if admissible at all, after defendant had rested, would only be as evidence to impeach the veracity of the witness, and its effect should have been limited by the court to that purpose. To admit it generally and for all purposes was error.

T. B. Johnson was called in rebuttal by the State and, as an expert, testified, generally, as to the apparent age of the calves, their actions, indicating that they had been raised on skim milk, and other circumstances which tended to support the theory of the prosecution in the case. The evidence given by him was in no sense rebuttal, but was a part of the State's case in chief, and, under

such circumstances, it was error to admit it. *State v. Hunsaker*, 16 Or. 497 (19 Pac. 605). We do not hold that the State may not, in a proper case and by leave of the court, obtained for that purpose, reopen its case and introduce evidence in chief, even after defendant has rested his case; but this was not done in the case at bar. The record shows that the testimony was offered simply in rebuttal. No reason was given, or showing made, to explain why it was not offered as part of the prosecutor's case in chief. While in a civil case we would not feel inclined to interfere with the discretion of the court in the order of proof, unless there appeared a clear abuse of such discretion, we think a more strict rule should be invoked in a case where the liberty of a citizen is involved, and that this is not a case that comes under the principle announced by this court in *Crosby v. Portland Ry. Co.*, 53 Or. 496 (101 Pac. 204).

For these errors the judgment of the lower court is reversed, and the case remanded, with directions to try the defendant for simple larceny. REVERSED.

Argued March 31, decided June 8, 1909.

OLIVER v. KLAMATH LAKE NAV. CO.

[102 Pac. 786.]

NAVIGABLE WATERS—CONVEYANCES—RIPARIAN RIGHTS.

1. Where defendant's remote grantor platted land situated on a navigable lake and river, and defendant thereafter acquired certain lots lying north of a certain street and extending into the water, defendant did not acquire any riparian rights south of the street, the original grantor and his successors retaining such rights, and hence defendant could not obstruct the lake or river south of the street to the injury of a riparian owner.

NAVIGABLE WATERS—NATURAL WATER COURSES—OBSTRUCTION—ACTIONS—DAMAGES.

2. Obstructions to navigation, unless legally authorized, are a nuisance, for the maintenance of which the person causing it is liable in damages to one specially injured thereby, or which he may enjoin or have abated.

NAVIGABLE WATERS—OBSTRUCTION—RIGHT TO INJUNCTION.

3. Plaintiff has access by water at all times to his property which is situated on a river near it, entrance into a lake, if the waters are free from obstruction, but the erection of a wharf in the river and lake by defendant who has no riparian rights at that point, would, on account of the lake water

freezing in winter, prevent access from the river, and also tend to cause the river to freeze in winter, further impeding plaintiff's access to his property. *Held*, that the injury to plaintiff's riparian rights entitled him to enjoin the erection of the wharf and to have removed any part thereof already erected.

From Klamath: HENRY L. BENSON, Judge.

Statement by MR. JUSTICE KING.

This is a suit by C. T. Oliver and the Mitchell, Lewis & Staver Company, a corporation, against the Klamath Lake Navigation Company, a corporation, and G. H. Woodbury to enjoin the construction of a dock or wharf between plaintiff's property and Link River, the construction of which, it is asserted, will materially interfere with the access to and from such river to plaintiff Oliver's property, to his injury and damage. Mitchell, Lewis & Staver Company's interest herein is that of a mortgagee only, for which reason Oliver will be treated herein as the sole plaintiff and referred to as such. Woodbury has no interest in the suit, and the cause, by consent, was at the trial dismissed as to him, leaving the Klamath Lake Navigation Company the sole defendant.

Link River has its source in upper Klamath Lake, and flows in a southerly direction into lower Klamath Lake. For a distance of about one mile from its source, it is known as Link River, and for the next two miles or more as Ewauna Lake, for which distance it will average about three-fourths of a mile in width, after which, and until it reaches lower Klamath Lake, it is designated as Klamath River. The town of Klamath Falls is situated upon and adjacent to the east bank of Link River, and on the north banks of Ewauna Lake, at the juncture of the lake and river, which river and lake are conceded to be navigable. It appears that in the early '70's George Nurse was owner of all the uplands and lowlands along Link River and Ewauna Lake in the vicinity of, and including, what is now the town of Klamath Falls, which town was platted by him in the usual manner into lots, blocks, streets, and alleys, and that defendant, through mesne conveyances, became the owner

of the south half of lot 1, and all of lots 2 and 3, in block 27; thence east to, and including, 11 feet in width by 60 feet in length, off the southwesterly portion of block 28, all situated north of Klamath street, and bordering upon, and extending into, the water on the east side of the channel of Link River, at the junction of the mouth of the river with what is called "Ewauna Lake." According to the averments of the complaint and findings of the trial court, which findings are amply sustained by the evidence, plaintiff Oliver, through mesne conveyances, became the owner of a tract of land south of Klamath street, described as follows:

"Commencing at the point of intersection of the easterly line of Payne alley, extending southerly, with the southerly line of Klamath street, in said City of Klamath Falls, Klamath County, Oregon; thence westerly, along the southerly line of said Klamath street, 220 feet; thence southeasterly to a point in said extended easterly line of Payne alley, 200 feet distant from said south line of said Klamath street; thence northwesterly to the place of commencement."

This makes a triangular tract of land immediately south of, and adjoining, Klamath street, and situated upon the northwesterly part of Lake Ewauna at its junction with Link River. For many years there has been a building upon this property, known as the "Oliver barn," which was used for keeping live stock until within about two years before the institution of this suit, since which time Oliver has resided there, and used the principal part of the building for warehouse purposes. He had partly constructed a wharf on the west side thereof between the building and the river, to be used for shipping purposes, when the defendant company, beginning upon the west end of the line of its property, where defendant's property joins the north line of Klamath street, adjacent to, and between Oliver's wharf and the river, commenced the construction of a wharf or dock 143 feet in width, which extended at right angles there-

from into the water a distance of 165 feet on the west side, and on the east side thereof for a distance of 160 feet, thereby extending across and beyond Klamath street, a distance of about 100 feet, along the east side of Link River, and on and into the west side of Ewauna Lake at its juncture with the river, and to that extent constitutes an obstruction to plaintiff's egress to and ingress from Link River. The testimony adduced discloses that the lake immediately south of plaintiff's property freezes during the larger part of each winter, and that, if the obstruction complained of is permitted, free access to and from plaintiff's property to the river will be materially impeded.

The trial court entered a decree dismissing the suit on the grounds that plaintiff was not injured by the obstruction, and accordingly in no position to complain, from which plaintiff appeals.

REVERSED: DECREE RENDERED.

For appellant there was a brief and an oral argument by *Mr. J. C. Rutenic*.

For respondent there was a brief over the names of *Mr. Pierce Evans* and *Messrs. Noland & Smith*, with an oral argument by *Mr. Richard S. Smith*.

MR. JUSTICE KING delivered the opinion of the court.

But two points of law appear to be involved in this controversy, namely: Has the defendant a right as a matter of law to place a wharf in the river or lake, as the case may be; and, if not, can plaintiff maintain a suit to enjoin such obstruction?

1. We think it clearly appears from the testimony adduced that defendant only purchased the property north of Klamath street, and that it is not the owner of any realty south thereof. That this is the legal effect of the conveyances through which it appears the company derails title, as well as that it cannot, as a matter of law, insist upon the right to place the wharf or other

obstruction in the river or lake, we think settled by this court adversely to defendant's contention in *Grant v. Oregon Nav. Co.*, 49 Or. 324 (90 Pac. 178, 1099). It is there held that the grantee's rights are circumscribed by the description in the deed, of which the town plat from which the description is taken, and to which reference is made, became a part; and that it is within the power of any grantor to sell his riparian rights separately from the lands to which appurtenant, or in making a conveyance of such realty, expressly or impliedly, to reserve such riparian rights, in reference to which the conveyances through which defendant derails title specifically describe the property by lots and blocks. This necessarily separated therefrom any riparian rights south of that street, leaving such riparian rights the property of the original grantor and his successors in interest. To the same effect are *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672 (3 Sup. Ct. 445; 4 Sup. Ct. 15: 27 L. Ed. 1070); *Morris v. United States*, 174 U. S. 196 (19 Sup. Ct. 649: 43 L. Ed. 946); *Goodsell v. Lawson*, 42 Md. 348; *Gilbert v. Emerson*, 60 Minn. 62 (61 N. W. 820); *Kenyon v. Knipe*, 2 Wash. 394 (27 Pac. 227: 13 L. R. A. 142).

2. As to the second question, it is well settled that impediments to navigation, unless authorized by some competent power, or by some legal right of the person causing it, are nuisances, and the person causing an obstruction of that character is liable to the person injured, and may, by a suit in equity, brought for the purpose by the person specially injured thereby, be enjoined from placing such obstruction therein; or, in the event the obstruction, or any part thereof, is completed, may have the same abated. 21 Am. & Eng. Enc. Law (2 ed.) 444; *Fleischner v. Investment Co.*, 25 Or. 119 (35 Pac. 174); *Blagen v. Smith*, 34 Or. 394 (56 Pac. 292: 44 L. R. A. 522); *Union Power Co. v. Lichty*, 42 Or. 563 (71 Pac. 1044); *Morton v. Oregon Short Line*

Ry. Co., 48 Or. 444 (87 Pac. 151, 1046: 7 L. R. A. [N. S.] 344: 120 Am. St. Rep. 827); *Kamm v. Normand*, 50 Or. 9, 15 (91 Pac. 448: 11 L. R. A. [N. S.] 290); *Garitee v. M. & C. C. of Baltimore*, 53 Md. 422. The case of *Morton v. Oregon Short Line Ry. Co.*, above cited, so far as the legal principles applicable are concerned, is similar to the one at bar. There the defendant company attempted, with permission of the owner of the adjacent land, to construct a jetty into Snake River, deflecting its course to the injury of Morton, a riparian proprietor below, which proprietor brought suit to enjoin any further extension of the jetty, praying a removal of the part completed, which was denied by the trial court, but granted on appeal. The question as to the navigability of the stream was raised in that case, but not determined. However, Snake River in the vicinity of the point on the stream there involved, has since been held by the Supreme Court of Idaho to be a navigable stream. *Moss v. Ramey*, 14 Idaho, 598 (95 Pac. 513); *Johnson v. Johnson*, 14 Idaho, 516 (95 Pac. 499).

3. In the case under consideration it conclusively appears that defendant company has no right, by reason of its ownership of the land north of Klamath street or elsewhere, to extend the wharf over the place in dispute, with reference to which it is, in effect, urged that it was done with the consent of the state and public in general, and that plaintiff was not injured, and accordingly has no right to complain. If defendant were a riparian owner to any part of the stream or lake south of Klamath street, and thereby entitled to wharf privileges, and the point were raised as to the extent of such right, a different question would be presented, making it necessary under such circumstances to determine the wharf rights and privileges of each of the contestants and ascertain in connection therewith whether plaintiff's rights in that respect extend at right angles to the thread of the stream, as held in *Montgomery v. Shaver*, 40 Or.

244 (66 Pac. 923), or in the manner determined in *Columbia Land Co. v. Van Dusen I. Co.*, 50 Or. 59 (91 Pac. 469; 11 L. R. A. [N. S.] 287), or at right angles to Lake Ewauna, if said lake is distinguishable from the river. But for the purposes of this case it can make no difference where the river ceases and the lake begins, for the navigability of each is conceded throughout, not only in the river and lake in general, but at the place covered by defendant's proposed wharf. In fact, the latter feature is shown by defendant's plat and data thereon, and it is unquestioned that in the natural condition of the lake and stream, plaintiff, at all times, has access to and from his property to Link River, while to permit the placing of the obstruction complained of between his warehouse and the main channel would, on account of the water south of the property, in what is called the lake, freezing during the winter months, prevent egress to and ingress from the river, while the water on the west between plaintiff's property and the river has at all times sufficient motion to prevent its freezing to such an extent as to impede navigation. It further appears that the obstruction complained of would naturally tend to check the current in the direction of plaintiff's property, and thereby materially increase the tendency of the water surrounding his premises to freeze, and correspondingly to obstruct his access to and from the river, which damage alone, to say nothing of the other features named, brings the case within the rule applied in *Morton v. Oregon Short Line Ry. Co.*, 48 Or. 444 (87 Pac. 151, 1046; 7 L. R. A. [N. S.] 344), where it was found that the jetty sought to be enjoined deflected the current in such manner as not only to wash away parts of plaintiff's lands, but reduce the current to such an extent as to interfere with the running of a ferryboat across the channel partly obstructed, at the same time leaving the channel in such condition that it was unfordable.

It follows that the decree of the lower court should be reversed and one entered enjoining defendant from placing any further obstructions in the stream or lake at the points indicated, and directing the removal within 90 days from the entry of the mandate herein of any part thereof placed therein; and it is so ordered.

REVERSED: DECREE RENDERED.

MR. JUSTICE MCBRIDE did not sit in this case.

Argued June 10, decided June 15, 1909.

ANDERSON v. PHEGLEY.

[102 Pac. 608.]

APPEAL AND ERROR—NOTICE OF APPEAL—SUFFICIENCY.

1. Under Laws 1899, p. 228, and Laws 1901, p. 77, declaring that a notice of appeal shall be sufficient if it contains the title of the cause, the names of the parties, and notice to the adverse party or his attorney that an appeal is taken to the supreme or circuit court, as the case may be, from the judgment, order, decree, or some specific part thereof, a notice that defendant Emma G. Robinson appeals from all of the judgment and decree, excepting those portions adjudging to the appealing defendant liens on the property described in the decree, and that among the particular portions of the judgment and decree from which this defendant appeals are those adjudging liens for any sums in favor of plaintiffs or any of them against such property and from those portions giving judgment for any sum against this defendant, was sufficient.

APPEAL AND ERROR—APPEAL BOND—CONDITIONS.

2. Where, in a suit to foreclose certain contracts constituting an equitable mortgage on mining property, the court fixed the value of the use of the land, and the amount so fixed was included in the undertaking of appeal, it was not defective because it did not also secure the performance of the assessment work required by the laws of the United States in order to save the property from forfeiture, pending appeal.

APPEAL AND ERROR—SUPERSEDEAS.

3. An appeal, though not perfected until the expiration of the time for objections to the sufficiency of the sureties, operated as a supersedeas from the date of its service and filing.

APPEAL AND ERROR—SUPERSEDEAS—EFFECT.

4. Where, in a suit to foreclose an equitable mortgage on mining property, one of the defendants perfected an appeal before sale, the sheriff should have continued the sale until after the time limited for objections to appellant's sureties, and then, in default of such objections, should have released the property.

APPEAL AND ERROR—SUPERSEDEAS—SALE AFTER APPEAL.

5. A sale under a foreclosure decree and an order confirming same after the perfection of an appeal by one of the defendants are invalid.

From Josephine: HIERO K. HANNA, Judge.

Statement by MR. JUSTICE MCBRIDE.

This is a suit by T. K. Anderson and J. K. Anderson as administrators of the estate of N. A. Williamson, deceased, substituted for said deceased and Albert Phillip, against Grant Phegley and Emma G. Robinson and is brought to foreclose certain contracts held to constitute an equitable mortgage on mining property and ditches in Josephine County. A decree foreclosing these liens was entered March 1, 1909. On the same day an execution was issued and the property advertised to be sold on April 1st. A notice of appeal was served on March 22nd, and an undertaking on appeal, with provision for stay of proceedings, was served and filed March 29th. Notwithstanding such notice and the filing of the undertaking, the property was sold and the sale confirmed by the court, over the objections of appellant, who appeals from the order of confirmation. The other facts necessary to the decision of this will be found in the opinion.

REVERSED.

For appellant there was a brief over the names of *Messrs. Gammans & Malarkey*, with an oral argument by *Mr. George G. Gammans*.

For respondent there was a brief over the names of *Messrs. Colvig & Durham*, with an oral argument by *Mr. George H. Durham*.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

1. Respondents concede that, if a sufficient notice of appeal was served and a proper undertaking filed, the order of confirmation is void. They challenge both the sufficiency of the notice and the undertaking. The notice, omitting the title of the court and the cause is as follows:

"Notice is hereby given that the defendant Emma G. Robinson appeals to the Supreme Court of the State of Oregon from all of the judgment and decree entered in the above-entitled court and cause, excepting those portions thereof whereby this defendant, Emma G. Robinson

is adjudged and decreed to have certain liens upon the property described in said decree and is to receive certain sums in case of the sale of the said property. Among the particular portions of said judgment and decree from which this defendant appeals are those adjudging and decreeing liens for any sums in favor of plaintiffs or any of them against the property in said decree mentioned or any part thereof, and from those portions giving judgment for any sum against this defendant."

We think the notice of appeal is sufficient. Previous to the amendments of 1899 and 1901 (Laws 1899, p. 228; Laws 1901, p. 77), a very strict rule prevailed, in respect to the certainty with which the judgment or decree appealed from should be described in the notice. Up to the date of these amendments there had been no statutory definition of what should constitute a sufficient notice. It was, no doubt, in view of this fact and of the hardships entailed by the strictness theretofore required, that the legislature saw fit to use this language:

"Such notice shall be sufficient if it contains the title of the cause; the names of the parties and notifies the adverse party or his attorney that an appeal is taken to the supreme or circuit court, as the case may be, from the judgment, order, or decree, or some specific part thereof."

This notice exactly follows the statute, and, examining the transcript, it is easily seen that respondents could not fail to know what decree was appealed from.

2. This court, in *Keady v. United Ry. Co.*, (100 Pac. 658), a case occurring since the amendment of 1899, *supra*, had occasion to construe this statute on a motion to dismiss the appeal, and the views therein expressed are in line with our views in the case at bar. To speculate that, perhaps, there might be two decrees between the same parties in different suits, having the same title, is to suggest an improbability that it is unprofitable to pursue. When a case is brought before us, supported by affidavits and certified copies of the records, showing such a state of fact, it will be time to

decide what ought to be done. The court fixed the value of the use and occupation of the land at \$1,500, and this amount was included in the undertaking on appeal. In other respects the undertaking is in the usual form and appears sufficient. It is objected that, as this is mining property held only by performing the annual labor required by the laws of the United States, which in this case would amount to about \$3,000, appellant should have been required to give an undertaking conditioned in a sufficient amount to cover any loss by possible forfeiture of the property by reason of failure to perform the required assessment work. We recognize that there is some force in respondents' contention; but, as the law has not provided for such a contingency, neither this court nor the court below had any authority to require such an undertaking.

3. We are of the opinion that, while the appeal would only be perfected from the expiration of the time required to object to the sufficiency of the sureties, it operated as a supersedeas from the date of its service and filing, namely, March 29, 1909. 20 Enc. Pl. & Pr. 1227, 1229; *Sam Yuen v. McMann*, 99 Cal. 497 (34 Pac. 80); *Mirick v. Hill*, 30 N. Y. Supp. 853.

4. The sheriff should have continued the sale until after the time limited for objection to the sufficiency of the sureties, and then, in default of such objection, he should have released the property.

5. The order confirming the sale herein is set aside, and this cause is remanded to the lower court, with directions to require the sheriff to put appellant in possession of the property described in the execution and order of sale, pending the decision of the principal case on appeal.

REVERSED.

Submitted on briefs March 25, decided June 22, 1909.

LACHMUND v. LOPE SING.

[102 Pac. 598.]

CONTRACTS—CONSTRUCTION—REPUGNANT CLAUSES.

1. The rule that, where in a contract clauses are repugnant, the earlier provisions prevail, if the inconsistency be not so great as to avoid the instrument for uncertainty, is subject to the qualification that the contract must be construed to effect the intention of the parties as gathered from the entire instrument, and where there are repugnant clauses, they must be reconciled, if possible.

CONTRACTS—INTENTION OF PARTIES.

2. The intent, and not the words, is the essence of every agreement, if it can be ascertained therefrom.

CONTRACTS—CONSTRUCTION—REJECTION OF REPUGNANT CLAUSES.

3. The rule rejecting a repugnant clause of a contract in construing it is an expedient to which a court will not resort, unless absolutely compelled to do so.

SALES—CONTRACTS—CONSTRUCTION.

4. A contract for the sale and purchase of a crop of hops, binding the seller to sell the crop, and to deliver "contract" hops, binding the buyer to purchase "contract" hops, and to make advances, providing that, on the failure of the seller to do anything which a careful husbandman would do to produce "contract" hops, the buyer may receive the same at a reduced price, and where the seller for causes beyond his control is unable to deliver "contract" hops, the buyer will accept in satisfaction of the agreement the hops raised at the reduced price, and giving the buyer the right, prior to making the advances called for, to examine the hopyard, and releasing him from liability to make further advances, or to accept the hops, if on inspection it appears that "contract" hops cannot be produced, etc., is complied with by a delivery of a lower grade of hops resulting from conditions for which the seller is not responsible, and the mortgage clause in the contract is available to the buyer only for liquidated damages, where by reason of the negligence of the seller, the hops are of inferior grade; and the buyer, on finding that "contract" hops cannot be produced, because of conditions not the result of the neglect of the seller, cannot refuse to make advances and terminate the contract.

SALES—CONTRACTS—ABANDONMENT.

5. The act of a buyer of a crop of hops in refusing to make the advances called for by the contract, or to be bound further by the contract, is an abandonment of it, precluding a recovery of advances previously made, where the seller was not in default.

From Marion: WILLIAM GALLOWAY, Judge.

Statement by MR. JUSTICE EAKIN.

This is a suit by Louis Lachmund and Julius Pincus partners doing business under the firm name and style of Louis Lachmund & Co., against Lope Sing, Oliver Beers, and Seid Back, to foreclose a contract and chattel mort-

gage on certain hops. The portions thereof, material to the issues here, are as follows:

"Agreement dated February 5, 1907, between Oliver Beers and Lope Sing, of Marion County, State of Oregon, called herein the seller, and Paul R. G. Horst, called herein the buyer, concerning the hop crop of the seller for the year 1907, and the sale of hops, not the product of the first year's planting, bright, even color, fully matured, free from mold or vermin damage, cleanly picked, properly dried and cured and put up in good merchantable order * * herein called 'Contract Hops' to be grown, harvested and prepared for market by the seller on that certain hopyard herein called the 'Hopyard' situated on that certain farm in Marion County, State of Oregon * * owned by Oliver Beers.

"First. The seller agrees, during the year 1907, in a careful and husbandlike manner, and in due season, to do all things which may be necessary in order to produce from the hopyard, contract hops, and to bargain and sell and he does hereby bargain and sell, and he does agree to deliver to the buyer in one lot * * forty thousand (40,000) pounds net weight of contract hops from the hopyard. * *

"Second. The buyer agrees to purchase forty thousand (40,000) pounds of contract hops of the crop of hops raised by the seller upon the hopyard in the year 1907, and to accept and receive the same when delivered in pursuance of this agreement, and to pay therefor the sum of twelve (12) cents per pound, that is to say: to pay one (\$1.00) dollar at the time of the signing hereof; eight hundred (\$800.00) dollars on or about April, 1907, and twenty-four hundred (\$2400.00) dollars during the picking season as the same shall be actually required. * *

"Third. Should the seller neglect or fail to do anything which, as a careful husbandman, he should do, in order to produce the contract hops, and if by reason thereof, or for any cause, the hops raised shall be inferior to contract hops, the buyer shall have the right and privilege of receiving and accepting so many thereof as are contract hops at the contract price, and the balance of the quantity contracted at a reduction in price equal to the difference in value between the hops tendered and contract hops * * but in the event that the seller, for causes beyond his control, is unable to deliver contract hops and, for

this reason, is unable to comply with this contract, the buyer agrees to accept, in satisfaction of this agreement, the hops raised and delivered at the reduced price, to be ascertained as above provided, but should the seller and the buyer fail to agree upon a price at which the inferior hops shall be accepted in fulfillment of this contract, then, in that event, the seller agrees to return all advances heretofore made with interest to the buyer upon demand.

"Fourth. It is contemplated between the parties hereto, that the seller shall require an amount not exceeding thirty-two hundred (\$3,200.00) dollars at the time specified, for the purpose of enabling him to pay the expenses of properly cultivating and caring for the hopyard and of picking, drying, curing and baling the product thereof, and for this reason and for these purposes, the buyer agrees to advance said sum at the times and in the manner and upon the request above mentioned, * * that should the seller make default in this agreement and by reason of such default, the buyer not being in default, 40,000 pounds of contract hops be not delivered in pursuance of this agreement, the buyer may recover of the seller damages for the seller's breach of this agreement, and in such event it is hereby agreed that the difference between the contract price and the market value at the time of delivery of forty thousand pounds of contract hops, together with all advances, with interest, are hereby fixed as the liquidated damages which the buyer shall recover from the seller for such breach. * *

"Fifth. The buyer shall have the right, prior to making any of the advances provided, to examine the condition of the hopyard, and if the hop crop at the time when such advances should be made, in pursuance of this agreement, is in such condition that contract hops cannot be grown, picked, cured and delivered therefrom, the buyer shall be absolved from the obligation to make further advances, but all advances already made hereunder, with interest, shall be repaid to the buyer upon demand."

The sixth subdivision is intended as a chattel mortgage of the whole crop to secure the buyer for the payment of the liquidated damages specified in subdivision four.

The complaint alleges that, pursuant to the terms of the contract, Horst advanced to defendant \$1,329.42, and

that thereafter, about September 10th, and prior to the time the money for picking was required to be advanced, Horst ascertained that the hops were moldy and inferior to the hops called for by the contract, and that contract hops could not be picked, cured, and delivered from said yard on account thereof; that Horst notified defendants that he would not advance money for picking, and would not be further bound by the terms of the contract, and demanded repayment of the advances already made. Thereafter Horst assigned to plaintiffs the contract and mortgage, and all his right and interest thereunder, and this suit is brought to recover the sum of \$1,329.42, with interest, and to foreclose the mortgage securing the repayment thereof. At the time Horst refused to make further advances the seller was unable to proceed with the picking without financial aid. Thereupon, in consideration of a bill of sale executed by the seller to defendant, Seid Back, transferring and delivering to him all the sellers's right, title in, and possession of, the crop, Seid Back took charge of the hopyard, paying the laborers for the work already done, and completed the harvesting and baling thereof.

Defendants deny that plaintiffs are entitled to recover from them the amount of the advances, and allege that they performed all the conditions of the contract, and that Horst, without cause, refused to comply with the terms of the contract. There is evidence offered by the plaintiffs tending to show that some portions of the hop field were affected with mold, and that portions of the baled hops, after the harvesting was completed, also contained considerable mold. Hop dealers were called as witnesses, and testified that hops are graded, according to quality, as medium, medium to prime, prime, prime to choice, and choice, and that contract hops, as defined in the contract, calls for choice hops. Most of the plaintiffs' witnesses testified that defendants' hops graded as medium to prime—three grades below choice—

and one witness testified that they were two grades below choice. The trial judge found as a fact that defendants performed their part of the contract in doing all that careful and skillful husbandry could do to raise the kind and quality of hops called for by the contract, and did raise 40,000 pounds of contract hops, and rendered a decree that plaintiffs take nothing by their suit, and that the complaint be dismissed. Plaintiffs appeal.

AFFIRMED.

Submitted on briefs under the proviso of Rule 16 of the Supreme Court, 50 Or. 580.

For appellants there was a brief over the names of *Mr. John A. Carson* and *Mr. Thomas Brown*.

For respondents there was a brief over the names of *Mr. William Kaiser*, *Mr. Henry E. McGinn*, and *Mr. John J. Fitzgerald*.

MR. JUSTICE EAKIN delivered the opinion of the court.

1. The defendants, Lope Sing and Oliver Beers, contracted to raise, on the Beers place, and sell to Horst, 40,000 pounds of contract hops at 12 cents per pound, and they were bound to do so if by careful and husbandman-like labor such a crop could be produced. However, subdivision three of the contract, without modifying subdivision two thereof, as to advances, provides, that, if by careful husbandry contract hops cannot be produced, Horst shall accept the hops in satisfaction of this contract, even though they are not contract hops, at a reduction in price equal to the difference in value between the hops tendered and contract hops. Plaintiffs rely upon subdivision five of the contract as releasing the buyer from liability to make further advances, or to accept the hops if, upon inspection, it appears that contract hops cannot be produced. That subdivision does not, in terms, negative the buyer's obligation to accept a lower grade than contract hops in satisfaction of the contract, but does

provide that, if contract hops cannot be produced, the buyer shall be released from making advances, and the seller shall repay the advances made, and this is repugnant to the provisions of the last part of subdivision three. The general rule is that, where in a contract clauses are repugnant and incompatible, the earlier prevails, if the inconsistency be not so great as to avoid the instrument for uncertainty. 1 Sheppard's Touchstone, 88; 2 Parsons, Contracts, *513; *Daniel v. Veal*, 32 Ga. 589; *Petty v. Boothe*, 19 Ala. 633. This rule is subject to the qualification, however, that the contract must be construed to effect the intention of the parties as gathered from the entire instrument; and, if there are repugnant clauses, they must be reconciled, if possible.

2. The intent, and not the words, is the essence of every agreement if it can be ascertained therefrom. *Henderson v. Mack*, 82 Ky. 379.

3. The rule that rejects a repugnant clause of a contract is an expedient to which a court will very reluctantly, in any case, have recourse, and never unless absolutely compelled to do so. *Bush v. Watkins*, 14 Beav. 425. This contract cannot be construed literally, and give effect to every part of it. Subdivision three provides that, in the event the seller—for causes beyond his control—is unable to deliver contract hops, the buyer agrees to accept, at a reduced price, in satisfaction of this agreement, the hops raised. Thus the delivery of low grade hops, resulting from conditions for which the seller is not responsible, will be a compliance with the contract as fully as the delivery of contract hops would have been. But by the latter part of subdivision four it is specified that liquidated damages may be recovered by the buyer should the seller make default, and 40,000 pounds of contract hops be not delivered. The only reasonable interpretation of this clause is that it applies to a violation of subdivision one, and the first part of

subdivision three, of the contract, which provides that, for the neglect or failure of the seller to do anything necessary to produce contract hops, it shall be optional with the buyer to accept inferior hops at a reduced price; and such neglect or failure of the seller is the default referred to in subdivision four, and it can have no application to the latter part of subdivision three, which provides that a delivery of inferior hops, under the conditions mentioned, shall be a satisfaction of the contract. The same construction must be put upon subdivision five, or it must be eliminated entirely. If, upon an inspection of the hopyard, as provided in subdivision five, it is found to be in such a condition that contract hops cannot be produced, nevertheless, if such condition is not the result of neglect or failure of the seller to do something necessary for the production of contract hops, the buyer will not be justified in refusing to make advances, as he is still under obligation to accept, in satisfaction of the contract, inferior hops; and, in such a case, the seller is not in default, and subdivision five must be construed as dependent upon the default of the seller. This construction will give effect to every part of the contract, and is in accordance with the clear intention of the parties, as gathered from the whole instrument.

4. There is no suggestion, in either the pleadings or the evidence, that defendants were in default in anything necessary to be done on their part to produce contract hops, and the evidence of plaintiffs' witnesses shows that the grade of the hops produced was at least medium to prime, or prime, and—considered most favorably to plaintiffs—if the hops were less than contract hops, they were so for causes "beyond the seller's control," and were such as the buyer agreed to accept at a reduced price. The buyer could not therefore refuse to be further bound by the terms of the contract, or require the seller to refund the advances theretofore made, unless the seller had refused to deliver the hops or agree with

the buyer upon a price at which they were to be delivered. It is unnecessary for this court to determine whether the hops produced were contract hops. By the last part of subdivision three of the contract the conditions of the liability of defendants to repay the advances made—if the hops produced are a lower grade than contract hops, without the fault of defendants—is that “the seller and buyer shall fail to agree upon a price at which the inferior hops shall be accepted in fulfillment of this contract.” The mortgage clause of the contract (subdivision six) is available to plaintiffs only for the liquidated damages provided for in subdivision four, namely, when by reason of neglect or fault of the seller the hops are of inferior quality, or, if they are contract hops, the seller refuses to deliver them. A situation may arise, and evidently did arise, by reason of which contract hops will not be called for by the contract, namely, in the event inferior hops are produced without fault of the seller, and under such condition the seller will not be in default in the delivery of contract hops to be “delivered in pursuance of this agreement.” The contract relates only to the hops raised on the Beers place, and not that the seller shall deliver contract hops at all events. It is only when “by reason of such default * * 40,000 pounds of contract hops be not delivered” that there shall be a liability, for example, if, through no lack of diligence or fault of defendants, hops of marketable quality are not raised, the seller would not be liable for damages under this clause of the contract. And it is not necessary now to determine what the effect of such a situation might have upon the right of plaintiffs to recover advances made, as that issue does not arise.

5. It appears by the allegations of the complaint that, when the buyer concluded that contract hops could not be grown, picked and delivered from the yard, he refused to make any further advances, and refused to be bound further by the contract. If the seller was not in default

at that time, the buyer's conduct was an abandonment of the contract, and he cannot recover the advances made thereon. *Neis v. O'Brien*, 12 Wash. 358 (41 Pac. 59: 50 Am. St. Rep. 894) is in point upon this question, being a suit to recover advances made on a hop contract, in which it is stated: "It was not the fault of the respondent that this contract was not fulfilled, but wholly the fault of appellant. The respondent offered to perform all that the contract required of him, but the appellant, having made part performance, stopped short, and refused to proceed to the completion of the contract. * * To permit the appellant to recover under the circumstances of this case, we think, would be to establish a dangerous precedent." To the same effect are *Witherow v. Witherow*, 16 Ohio 238; *Hansborough v. Peck*, 5 Wall. 497 (18 L. Ed. 520); *Walter v. Reed*, 34 Neb. 544 (52 N. W. 682).

The decree of the lower court is affirmed.

AFFIRMED.

Argued April 1, decided June 22, 1909.

GENTZKOW v. PORTLAND RAILWAY CO.

[102 Pac. 614.]

ELECTRICITY — INJURIES FROM CONSTRUCTION AND MAINTENANCE OF STREET RAILROAD—CARE REQUIRED.

1. An electric railway company maintaining and controlling a trolley system must exercise the utmost degree of care in the construction, maintenance, inspection, and repair of its wires, so as to keep them harmless at places where persons are liable to come in contact with them, and its duty is not lessened as to servants of a telephone company, where under an agreement, it is permitted to attach its wires to poles of the telephone company.

ELECTRICITY — INJURIES INCIDENT TO PRODUCTION AND USE—CARE REQUIRED.

2. Where an electric railway company and a telephone company jointly use a structure to which the wires of each are attached, each is under the same obligation to the other as persons having common rights in a place are to one another, not negligently to place a dangerous substance on the common territory, where it may be reasonably anticipated that others having common rights may be injured.

ELECTRICITY — INJURIES INCIDENT TO PRODUCTION AND USE—CARE REQUIRED.

3. An electric railway company permitting for a day and a half a circuit breaker to be displaced, so as to allow a wire of a trolley system to come in

contact with a telephone wire, is guilty of actionable negligence, irrespective of how the displacement occurred.

ELECTRICITY—INJURIES INCIDENT TO PRODUCTION AND USE—CARE REQUIRED.

4. An owner of electrically charged wires, which became disarranged without his negligence, is entitled only to a reasonable time after the condition arises, in which to discover and remove the dangers resulting therefrom.

ELECTRICITY—INJURIES INCIDENT TO PRODUCTION AND USE—CARE REQUIRED.

5. An electric railway company, maintaining a trolley system, is under the duty of continuous inspection of its wires.

ELECTRICITY—INJURIES INCIDENT TO PRODUCTION AND USE—CARE REQUIRED.

6. In the absence of proof that wires forming a part of a trolley system were cut by trespassers, the inference is that it was done by some one on behalf of the owner of the system, for the purpose of rearranging the position of the wires.

ELECTRICITY—INJURIES INCIDENT TO PRODUCTION AND USE—CARE REQUIRED.

7. Evidence held sufficient to go to the jury on the issue of the negligence of an electric railway company maintaining a trolley system resulting from its permitting its trolley service wire to fall on a trolley wire and thereby permit the escape of electricity.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

8. The burden of proving contributory negligence is on defendant, and plaintiff need not show freedom from negligence.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

9. Where the evidence offered to establish negligence of defendant, resulting in injury to plaintiff, showed that plaintiff was guilty of negligence, without which the injury would not have occurred, plaintiff could not recover.

NEGLIGENCE—ASSUMPTION OF RISK.

10. Where no contract relation existed between plaintiff, suing for a personal injury, and defendant, the doctrine of assumption of risk, as distinguished from contributory negligence, did not apply, unless plaintiff knew and appreciated the danger and voluntarily put himself in the way of it.

ELECTRICITY—INJURIES FROM PRODUCTION AND USE—CONTRIBUTORY NEGLIGENCE.

11. One who knew, or who should have known, that wires supporting a trolley service wire were charged with a dangerous current of electricity, and who voluntarily exposed himself to the risk of being shocked thereby, was chargeable with contributory negligence precluding a recovery for the injuries received.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

12. Contributory negligence will not in all cases be imputed, as a matter of law, to a person who receives an injury from a danger, simply from the fact that it might have been seen, because the nature of his duties or surrounding circumstances may be such as to distract his attention to other objects, and under such circumstances the question is for the jury.

ELECTRICITY—INJURIES FROM PRODUCTION AND USE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

13. Whether an employee of a telephone company coming in contact with an electrically charged iron peg in a telegraph pole, in consequence of the

negligence of an electric railway company maintaining a trolley system, was guilty of contributory negligence, *held*, under the evidence, for the jury.

ELECTRICITY—INJURIES FROM PRODUCTION AND USE—CONTRIBUTORY NEGLIGENCE.

14. An employee of a telephone company may assume that a wire of an electric railway company not intended to carry electricity and attached to a telephone pole, under an agreement with the telephone company, is harmless.

NEGLECT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

15. Where contributory negligence is urged, as a ground for nonsuit, or for a verdict for defendant, it must appear, after considering the evidence most favorably to plaintiff, that reasonable men would find, without any reasonable probability of differing in their views, either that plaintiff knew and appreciated the danger, or that ordinarily prudent men would acquire such knowledge and appreciation.

From Multnomah: JOHN B. CLELAND, Judge.

Statement by MR. JUSTICE SLATER.

This is an action by George H. Gentzkow against the Portland Railway Company to recover damages for personal injuries alleged to have been sustained by plaintiff from receiving an electric shock, caused by the negligence of defendant in permitting and allowing its trolley service wire to sag and fall upon and across the the north trolley wire of its double-track street railway system on Russell street, in the city of Portland, Oregon, so that the circuit breaker, attached to the north end of the service wire, was upon the south side of the trolley wire, and permitted an ordinary uninsulated galvanized wire, leading from the circuit breaker to a telephone pole on the north side of the street, to come in contact with the trolley wire and become heavily charged with a dangerous current of electricity. The telephone pole was the property of the Pacific States Telephone Company, and plaintiff, as its servant, and while in the discharge of the duties of his principal, and without knowledge of the displacement of defendant's wires, ascended the telephone pole, and, coming in contact with an iron climbing peg, to which defendant's wire was attached, received a severe and dangerous electric shock, causing him to be thrown and precipitated to the ground, a distance of about 28 feet, breaking his leg and otherwise injuring him.

Defendant denies any negligence on its part and affirmatively alleges that any injury which plaintiff suffered resulted from his own want of care and contributory negligence. At the close of plaintiff's case defendant interposed a motion for a nonsuit, which at that time was denied, but at the close of defendant's case, was renewed and granted; and, judgment having been entered against plaintiff, he has appealed. REVERSED.

For appellant there was a brief over the names of *Mr. George W. Caldwell* and *Messrs. Gammans & Malarkey*, with an oral argument by *Mr. Dan J. Malarkey*.

For respondent there was a brief and oral arguments by *Mr. Ralph W. Wilbur* and *Mr. Arthur M. Dibble*.

MR. JUSTICE SLATER delivered the opinion of the court.

The testimony tends to show that plaintiff was employed as a lineman by the Pacific States Telephone & Telegraph Company, which owned and operated a telephone line along the north side of Russell street, in Portland. His duty was to locate and remove troubles in the telephone service due to crossed wires and similar causes, and he had been so employed for about one year, but did not consider himself an experienced lineman. On and prior to August 8, 1904, defendant owned and operated a double-tracked street car line running east and west on Russell street. The cars were propelled by electricity, transmitted through trolleys, which were in contact with heavy copper wires called "trolley wires," suspended over the center of each track, and parallel therewith. On the south side of Russell street the Portland General Electric Company, a third corporation, owned and maintained a line of poles, which carried its electric light wires, and also a wire to transmit electric currents for power purposes. Attached to this line of poles, at the height of about four feet above the level of the defendant's trolley wires, was what is known as

a "feed wire," charged with a heavy current of electricity for the propulsion of defendant's cars. This current was transmitted to the trolley wires by an insulated copper wire, called a "trolley service wire." One of its poles was located about 100 feet east of Williams avenue and standing near the curb line of the street, and was opposite to and south of the telephone pole on the north side of Russell street, on which plaintiff was injured. A trolley service wire, connected with this feed wire, extended northerly from this pole, across, and about three feet above, the trolley wires at right angles therewith, and was connected with each of them by an upright wire. The trolley service wire proper terminated a short space beyond the north trolley wire, where there was interposed a circuit breaker. This instrument was made of two hollow porcelain knobs, or spools, firmly joined at an interval by iron or steel straps, so that when wires were attached to each spool at the opposite ends thereof there would be no metallic connection of such wires. Attached to the north end of this circuit breaker was an ordinary uninsulated galvanized wire, which extended northerly across the remainder of the street and was attached to the telephone pole by being wound around it. The purpose of this galvanized wire was to furnish a support to the trolley service wire and keep it suspended above the trolley wires, and was intended to be free of any electric current. On and near the top of this telephone pole there were a number of cross-arms, to which were attached telephone wires, and on the east and west sides of the pole, and below the cross-arms, were driven a number of iron spikes, or pegs, at intervals, to serve as steps for linemen when climbing the pole. One of these spikes was located at the place where defendant's wire support for the trolley service wire passed around the pole, and it touched, or was wound around, the peg. A fire alarm signal wire running to an engine house near by was also attached

to this pole at a point four or five inches below the next iron peg above the one in contact with defendant's wire. There was no electric current in the signal wire, except when an alarm was being sounded, and then only a small and harmless current. For a day and a half to two days prior to the time of the accident, the circuit breaker was not in its proper position relative to the trolley wire; but, because either the trolley wires had been raised by the servants of the defendant, or because the poles supporting the service wire had been moved towards the street by the owners thereof, thereby slacking the wire, the north trolley wire and the uninsulated galvanized wire were in contact at a point just north of the circuit breaker, the latter lying upon the trolley wire so that the circuit breaker hung over on the south side of the trolley wire. So long as this circuit breaker was in a proper condition, and in its proper place, no current could pass into the galvanized wire which extended from it to the telephone pole; but, when it was in the position above stated, the galvanized wire, from its contact with the trolley wire, became charged with a heavy current, and thus rendered it, and the iron peg to which it was attached, dangerous to any one coming in contact therewith, and at the same time with some other conductor having connection with the earth. The signal wire, being a grounded wire, furnished this agency.

Plaintiff was employed as a lineman by the telephone company, and had been thus engaged for about one year. He was not considered an expert lineman, as three years' service was required to attain that efficiency although he had had sufficient experience to know and understand the amount of electric current usually transmitted over the different kinds of wires and their dangerous character, the purposes for which the different wires were used, when they were in their proper positions and the danger to be encountered in working among them.

Prior to the accident he had frequently been upon this particular telephone pole, but had not been in that vicinity for a number of days, and had no previous knowledge of the displacement of defendant's wires. On the morning of the 8th of August, plaintiff was sent to this vicinity by his employer to locate and remedy some defect in its telephone wires. He approached the vicinity, coming from the east on the south side of Russell street, scanning the telephone wires at the top of the poles on the north side of the street to locate the trouble. He discovered two wires crossed between the pole he afterwards climbed and the one east of it. He then crossed to the north side of the street, passing under defendant's trolley wires, in the neighborhood of the displaced circuit breaker, went to the telephone pole, and ascended it from the north side thereof. This pole is about 15 inches in diameter at the base and tapers somewhat towards the top, and while plaintiff was climbing, it was between him and the trolley service wire and the displaced circuit breaker, so that his view thereof was obstructed. When he reached the iron peg on which defendant's wire rested and grasped it with his hand, he observed that the wire around the pole was in contact with the peg, and it then appeared to him to be in its usual place. Upon reaching for the next peg above, his arm came in contact with the signal wire just below it, thus forming a circuit and causing him to receive an electric shock, which occasioned the injury complained of in this action. The motion for a nonsuit is upon two grounds: (1) That plaintiff had not shown any negligence on the part of the defendant; and (2) that the proof showed that plaintiff was guilty of contributory negligence. The motion was sustained by the trial court upon the latter ground; but both are insisted upon here.

1. The defendant, employing in its business an agency so deadly and dangerous as electricity, is held to exercise the utmost degree of care in the construction, mainte-

nance, inspection and repair of it wires, so as to keep them harmless at places where persons are liable to come in contact with them. *Perham v. Portland Electric Co.*, 33 Or. 451 (53 Pac. 14, 24: 40 L. R. A. 799: 72 Am. St. Rep. 730). Its duty was not in any respect lessened with respect to the servants of the Pacific States Telephone Company, because, by reason of some agreement or license, it was permitted to attach its wires to a pole belonging to the telephone company.

2. Where two corporations are making a joint use of a structure to which the wires of each are attached, each should be under the same obligation to the other, as persons having common rights in a place or passageway are to one another, not negligently to place a dangerous substance on the common territory where it may be reasonably anticipated that others having common rights may be injured. The purpose for which the structures are used render some danger from electrical currents inevitable; but the danger ought to be made as small as is practicable by the exercise of reasonable care. *Illingsworth v. Boston Electric Light Co.*, 161 Mass. 583 (37 N. E. 778: 25 L. R. A. 552).

3. The evidence is positive and direct that for a period of a day and a half or two days the circuit breaker had been in the displaced condition which caused the unfortunate contact of the trolley wire with the wire attached to the pole and iron peg. However it may have been caused, the continuance of such conditions for that period of time would of itself constitute actionable negligence on the part of defendant.

4. If the derangement of the wires was caused without the negligence of the defendant, it was entitled only to a reasonable time after the condition arose in which to discover and remove the dangerous wire. *Chaperon v. Electric Co.*, 41 Or. 39, 40 (67 Pac. 928).

5. It is shown that defendant was continuously using these tracks, its cars passing along at brief periods of

time, and, being under the duty of a continuous inspection (Thompson, Negligence, § 802), and the displacement open to the view of its servants, there was sufficient to go to the jury upon that feature of the case.

6. There is evidence, however, that the displacement was by the defendant's servants. One witness testifies that two or three days prior to the accident, two men, whom the witness took to be defendant's men, came along and raised the trolley wires that go up and down Russell street, and that before they were raised they were quite low. It is also shown that the two upright wires from the trolley wire to the feed wire had been cut and were hanging down. It is not to be inferred that these wires were cut by a trespasser; but, in the absence of proof, the legitimate inference is that it was done by some one on behalf of the defendant, for the purpose of rearranging the position of its wires.

7. On this feature of the case, we are of the opinion that there was sufficient evidence of defendant's negligence to go to the jury.

8. In this State the burden of proving contributory negligence is upon the defendant, and the plaintiff is not required to show that he was free from negligence.

9. If it appears, however, from the proof offered to establish the defendant's negligence, that he himself was also guilty of negligence, without which the injury would not have occurred, such proof will defeat his recovery. *Grant v. Baker*, 12 Or. 329 (7 Pac. 318); *Scott v. O. R. & N. Co.* 14 Or. 211 (13 Pac. 98); *Tucker v. Northern Terminal Co.*, 41 Or. 82 (68 Pac. 426).

10. Defendant's counsel contends, in support of this portion of his motion: That it was plaintiff's duty to exercise his thinking faculties and his sense of sight in discovering and avoiding danger; that, taking into consideration his experience, his knowledge of the conditions and dangerous character of the work in which he was engaged, it should be said, as a matter of law, that

his injury resulted from his own want of care in failing to observe the position and condition of the trolley service wire and the circuit breaker which was open, visible, and plainly observable to one in the exercise of ordinary care or precaution. Plaintiff knew the location and purpose of all the wires attached to the pole, including the defendant's trolley service wire; but he also knew that this wire consisted of two parts, namely, the insulated portion south of the circuit breaker and the uninsulated portion north of it, which was wrapped around the pole and the iron climbing peg. He was familiar with the proper location and normal position of the circuit breaker, and what it was for, and realized, as he testified, that if, for any reason, it failed to work properly, or was out of order, the wire attached to the pole would be charged with electricity and be dangerous, and, had he known the condition the wires were in, he would not have ascended the pole. Plaintiff was not a servant of defendant and no contractual relation existed between them. Hence the doctrine of assumption of risk, as distinguished from contributory negligence—that is to say, from the failure of the plaintiff to exercise ordinary care to avoid injury—does not apply in this case, unless he knew and appreciated the danger and voluntarily put himself in the way of it. 1 Thompson, Negligence § 184.

11. He can be charged with contributory negligence if he knew, or should have known, that defendant's wire, which supported the trolley service wire, was charged with a dangerous current of electricity, and then voluntarily exposed himself to the risk of being shocked thereby. He testifies that he did not know; but it is contended there are some circumstances surrounding the case that might indicate a possibility that he may have known, such as that it was a bright day, that the circuit breaker was made of white material and could be easily seen by a person on the sidewalk opposite thereto, if he

happened to look in that direction, and that, before the accident, when plaintiff was on the south side of the street looking for the interference among the telephone wires his line of vision was necessarily in proximity to the displaced circuit breaker.

12. Contributory negligence will not in all cases, however, be imputed, as a matter of law, to a person who receives an injury from a danger, simply from the fact that it might have been seen, because the nature of his duties, or the surrounding circumstances, may be such as to distract his attention to other objects. 1 Thompson, Neg., § 189; *Webb v. Heintz*, 52 Or. 444 (97 Pac. 753).

13. Under the circumstances, the question is for the jury, and not for the court. *Illingsworth v. Boston Electric Light Co.*, 161 Mass. 583 (37 N. E. 778; 25 L. R. A. 552); *Mahan v. Newton & Boston Street Ry. Co.*, 189 Mass. 1 (75 N. E. 59); *Reagan v. Boston Electric Light Co.*, 167 Mass. 406 (45 N. E. 743); *Commonwealth Electric Co. v. Rose*, 214 Ill. 545 (73 N. E. 780); *Knowlton v. Light Co.*, 117 Iowa 451 (90 N. W. 818); *Paine v. Electric Illuminating Co.*, 64 App. Div. 477 (72 N. Y. Supp. 279); *Stevens v. Company*, 73 N. H. 159 (60 Atl. 848; 70 L. R. A. 119).

14. Plaintiff came to the *locus in quo* in the performance of his duties; that is, scanning the telephone wires on the north side of Russell street, which were east of and far above the level of defendant's trolley service wire. When he stopped on the south side of the street, he was east of the service wire, and the interference in the telephone wires, which he had discovered was still east of his then position, so that it does not necessarily appear that the displaced circuit breaker was, at any time, directly in his line of vision, for it would appear that he was looking away from it rather than towards it. As he climbed the pole, his eye naturally would not follow the stretch of the galvanized wire out to the circuit

breaker, because of the intervening pole. He would naturally be looking up at the steps which he must successively grasp to raise himself, and he testifies that he could not have seen the service wire unless he had stopped and looked around the pole, which he says he did not do, but that he was looking over at the pole next east of him, in which direction he had located the trouble. So far as the direct testimony of the plaintiff goes, it tends to show that he was ignorant of the displacement of the circuit breaker and of the resulting electric current in the galvanized wire wound around the pole and the iron peg with which he was in contact. We cannot say that his ignorance of that fact was negligence. He was where he had a right to be, and had the unrestricted right to the use of the iron peg. We think he also had a right to assume that the wire was harmless, because that involves only the assumption that defendant had fully performed the duty that the law imposes upon it. The wire was not intended to carry a current of electricity, as its very appearance manifested, and, if there was any possibility of its becoming so charged, there was no duty thereby imposed upon plaintiff to inspect or search for a defect in defendant's wires; but the latter owed the former the special duty of guarding him against danger from that wire, and he had the right to assume that defendant had performed that duty. *Perham v. Portland Electric Co.*, 33 Or. 451 (53 Pac. 14, 24: 40 L. R. A. 799: 72 Am. St. Rep. 730); *Bergin v. Southern New Eng. Tel. Co.*, 70 Conn. 54 (38 Atl. 888: 39 L. R. A. 192).

15. Can it be said, then, as a matter of law, that the misplaced circuit breaker was so conspicuous, and in such proximity to the plaintiff when so engaged in the line of his duty that, under the surrounding circumstances, he must have observed it, notwithstanding his statement that he did not see it, for a thing may be so obtrusive that a person could not avoid seeing it without shutting

his eyes or averting his head; but that is not the condition here. It is quite reasonable and probable that plaintiff's attention was so engaged in the search for the trouble in the telephone wires, and his immediate work in respect thereto, that he took no note of the dangerous condition of defendant's wires; the point or origin of the danger being distant perhaps at least thirty or forty feet from him at the time of the accident. In the performance of his work he was not obliged to come within immediate contact of any part of defendant's wires where they were displaced, so as to unavoidably impart a notice or warning, nor did he unnecessarily, or at all, touch them or interfere with them; and it cannot be said, under such circumstances, as must be said to sustain a nonsuit, that there is a necessary inference from the evidence, measured by the ordinary and uniform experience of men, that plaintiff saw the condition of defendant's wires before the accident. The rule by which such a conclusion is to be reached is well stated by Mr. Justice WALKER, in *Stevens v. Company*, 73 N. H. 159, 163 (60 Atl. 848, 850: 70 L. R. A. 119):

"When this defense (contributory negligence) is urged as a ground for a nonsuit or for a verdict for the defendant, as it is in this case, it must appear that reasonable men, acting as the triers of the fact, would find, without any reasonable probability of differing in their views, either that the plaintiff knew and appreciated the danger, or that ordinarily prudent men under the same circumstances would readily acquire such knowledge and appreciation. The fact of actual or constructive knowledge on the part of the plaintiff must appear, either directly or by necessary inference from the evidence and the uniform experience of men, before the court can order a nonsuit or direct a verdict upon this ground; and this result must follow after the evidence has received a construction most favorable to the plaintiff. *Hardy v. Railroad*, 68 N. H. 523, 536 (41 Atl. 179)."

And Mr. Justice MOORE, in *Jonston v. Oregon S. L. Co.*, 23 Or. 94, 105 (31 Pac. 283, 286) has thus defined an obvious risk:

"An open visible risk is such an one as would in an instant appeal to the senses of an intelligent person. Wood, Mas. & Ser. 763. It is one so patent that it would be instantly recognized by a person familiar with the business. It is a risk about which there can be no difference of opinion in the minds of intelligent persons accustomed to the service. It is not expected that the servant will make close scrutiny into all the details of the instrumentalities with which he deals. His employment forbids that he should thus spend his time. If the rule were otherwise, the management of a great railway system would be needlessly slow. The servant is expected to observe such objects only, in the absence of notice, as would in an instant convince him of their danger."

The case of *Bergin v. Tel. Co.*, 70 Conn. 54 (38 Atl. 888: 39 L. R. A. 192) cited by defendant, is readily distinguished from the present case. Bergin had been expressly warned a day or two before the accident, of which he complained, that the particular guy wire of the electric railroad company, which caused the injury, was charged with electricity, and, notwithstanding the warning, he carelessly allowed a wire which he was holding to come in contact with the dangerous guy wire. *Law v. Central Dist. Printing & Telegraph Co.*, (C. C.) 140 Fed. 558, is a case where a servant has sued a master, and the point involved is contributory negligence. The cause of the accident was a displaced electric light wire coming in contact with a guy wire. Plaintiff was in the act of climbing the pole to which both wires were or had been attached. It was taken as an established fact that the contact of the electric wire with the guy wire was not observable from the ground, nor that the insulation was gone, nor was there any particular warning in the circumstance shown by the evidence that the bracket to

which the electric wire had been attached was vacant; but the court said: "Whatever allowance is to be made for these things, they disappear after the plaintiff had climbed the pole and had the situation immediately before him. Had he taken pains to look, he would not have failed to have seen, what must have been within a foot of his eyes, that the electric light wire, which was plainly distinguishable by its size, was down against the pole in contact with the guy wire, which it thereby of necessity charged with its high tension current; and yet, notwithstanding this, he reached out and took hold of the guy wire to help himself up onto the cable, with the unfortunate result which followed." *Anderson v. Inland Tel. Co.*, 19 Wash. 575 (53 Pac. 657: 41 L. R. A. 410) also cited by defendant, is a case somewhat similar in facts to the present case. The plaintiff had sued both his employer, the telephone company, and the street railway company, but dismissed as to the latter, and his right to recover was left to depend upon the rights and duties arising from the relationship of master and servant, which differentiates the case from the one in hand. Other cases cited by defendant are of the same character and are not applicable here.

We are of the opinion that the court erred in ordering a nonsuit, and the judgment is therefore reversed, and the cause remanded for a new trial. **REVERSED.**

Argued May 4, decided June 29, 1906.

RUSSELL v. OREGON R. & N. CO.

[102 Pac. 619.]

RAILROADS—OPERATION OF TRAINS—CARE REQUIRED.

1. A railroad must use all reasonable precautions to protect the traveling public from injury from the operation of its trains, and such precautions must be reasonably commensurate with the danger; the duty varying with the circumstances of each particular case.

RAILROADS—OPERATION OF TRAINS—CARE REQUIRED.

2. Whether a railroad was negligent in failing to provide a flagman or automatic signals at a crossing, *held* under the evidence for the jury.

RAILROADS—OPERATION OF TRAINS—CARE REQUIRED.

8. Where the undisputed evidence shows extraordinary dangers to the traveling public on a railroad crossing, it is not error to submit to the jury the question whether reasonable care demands that a watchman, or other method of warning than the use of the bell or whistle, should be adopted.

RAILROADS—ACCIDENT AT CROSSING—PROXIMATE CAUSE.

4. A freight train, equipped with air brakes, and managed entirely from the engine, was half an hour late in reaching a highway crossing. The absence of a brakeman delayed the train, but there was nothing to show that the train was run at any different speed, or managed in any different way, than it would have been had the brakeman been at his post, *Held*, that the absence of the brakeman was not the proximate cause of an accident occurring at the highway crossing in collision with a traveler.

RAILROADS—CROSSING ACCIDENT—MISLEADING INSTRUCTIONS.

5. Where, in an action for the death of a traveler struck by a train at a railway crossing, the complaint alleged a negligent failure to have a full crew of train hands, but the evidence failed to support the allegation, an instruction, making it the duty of a railroad to man its trains with a sufficient crew, was misleading, because it could only refer to the want of a brakeman, established by the evidence.

NEGLIGENCE—NEGLIGENT ACT—LIABILITY.

6. One is liable for any act, the injurious consequences of which an ordinarily prudent man would be likely to see and guard against.

RAILROADS—NEGLIGENCE—OPERATION.

7. Negligence cannot be predicated on the mere fact that a freight train is behind time, and it matters not from what particular cause the delay arose.

RAILROADS—OPERATION OF TRAINS—NEGLIGENCE.

8. No rate of speed of trains is negligence *per se*, but circumstances may require a diminished speed, and it is only the force of such circumstances which creates such a duty.

RAILROADS—OPERATION OF TRAINS—NEGLIGENCE.

9. In an action for the death of a traveler struck by a train at a crossing, evidence *held* to require submission to the jury of the issue of negligence in operating the train at a dangerous speed.

RAILROADS—CROSSING ACCIDENT—MISLEADING INSTRUCTIONS.

10. In an action for death of a traveler, struck by a train at a railroad crossing, defendant requested the following instruction: "The convenience of the public and commercial industry demand the conveyance of passengers and freight at a greater speed than can be accomplished by ordinary conveyance; that the railroad company cannot be required to slow down its trains, or run at such rate of speed across country crossings, or those in small villages, as will preclude the possibility of accident. Such requirements would be incompatible with rapid transit required of such companies. No rate of speed across a country crossing, or one in a small village, is of itself negligence; and, if you find from the evidence that the rate of speed at which said train was being operated, was consistent with the obligation resting on the company, then and in that event you cannot find defendant guilty of negligence on account of the rate of speed at which said train was being operated." *Held*, that the instruction was properly refused, because not stated in language sufficiently simple to enable the average juror to comprehend it.

TRIAL—INSTRUCTIONS—FORM OF INSTRUCTIONS.

11. Unless an instruction is so definite as to enable one of average intelligence to understand it, it ought to be refused as misleading, and a court ought

not to give an instruction which, though stating the law correctly, is not couched in language sufficiently untechnical to be comprehended by the average juror.

TRIAL—SPECIAL INTERROGATORIES—GENERAL VERDICT.

12. Where the jury fails to agree on an answer to an interrogatory, and returns a general verdict, the effect of the failure to agree is to eliminate from the case the matter embraced in the interrogatory, at least so far as it is sought to make it a substantive ground for recovery.

TRIAL—SPECIAL INTERROGATORIES—GENERAL VERDICT.

13. Where several grounds of recovery are alleged, and an interrogatory submitted to the jury goes only to one of them, the general verdict returned by the jury will stand, notwithstanding their failure to agree on an answer to the interrogatory, as it will be presumed that the jury based their verdict on some other ground.

TRIAL—SPECIAL INTERROGATORIES—GENERAL VERDICT.

14. Where the court decides to submit a special finding, it should hesitate to allow the jury to return its general verdict and ignore the finding, for it creates a doubt as to whether the jury agreed on the ground of recovery, and a good verdict must be based on a ground on which all the jurors agree.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

15. An infant is, as a general rule, only required to exercise that care in avoiding injury that the evidence shows him to be capable of.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

16. A boy 13 years old, bright and intelligent, does not, as a matter of law, possess the judgment and discretion of an adult, and the question of his exercising proper care in avoiding injury is for the jury.

APPEAL AND ERROR—BILL OF EXCEPTIONS—CONCLUSIVENESS.

17. The court on appeal is bound by the bill of exceptions, and cannot look outside of that to ascertain what took place.

RAILROADS—ACCIDENTS AT CROSSINGS—NEGLIGENCE—INSTRUCTIONS.

18. Where, in an action for the death of a traveler struck by a train at a crossing, the complaint alleged negligence in failing to have a full train crew, and not reducing the speed of the train when approaching the crossing, in not sounding the whistle and ringing the bell, and in not maintaining a watchman or automatic whistle to warn travelers, and the evidence wholly failed to establish negligence in failing to have a full train crew, an instruction that plaintiff need not prove that the railroad company was negligent in all of the particulars alleged, but only that it was negligent in some of them, was erroneous, because it impliedly submitted to the jury the alleged failure to have a full train crew.

EVIDENCE—NEGATIVE AND POSITIVE EVIDENCE.

19. The comparative value of positive and negative testimony depends on the means of knowledge of the witnesses, their opportunity to know the facts and their apparent candor and demeanor on the witness stand.

TRIAL—INSTRUCTIONS—WEIGHT OF EVIDENCE.

20. Under the statute providing that the jury are the sole judges of the value and effect of evidence, an instruction that the testimony of a witness that a thing actually occurred, is of more value than the testimony of a witness who says he did not see or hear the occurrence, is an invasion of the province of the jury.

From Union: THOMAS H. CRAWFORD, Judge.

Statement by MR. JUSTICE MCBRIDE.

This is an action by J. A. Russell, administrator of the estate of J. Donald Russell, deceased, to recover damages on account of the death of the said J. Donald Russell, who was struck and killed by a railway locomotive on defendant's road at Perry, in Union County, on July 30, 1907.

The complaint alleges that the deceased was about thirteen years old, healthful, of good habits, and intelligent; that defendant's railway track crosses the public highway, practically on a line therewith, at the village of Perry, a town of about 300 inhabitants; that the crossing is near a point in the Grande Ronde River where a high dam is constructed, over which the waters fall, making a loud noise; that the ground formation in the vicinity is that of a mountain canyon, and that all sounds of bells, whistles, and other signals of the defendant's trains coming from the west are so reverberated and re-echoed in the vicinity of the crossing as to deceive and confuse travelers approaching the same, and to make it appear to them that the cars and engines, actually coming from the west, are approaching the crossing from the east; that defendant's railroad crosses the highway at the east end of a deep cut, through which defendant's track extends westward from the crossing, and that, by reason of a curve in the cut and track, immediately west of the crossing, travelers nearing it cannot see engines or cars approaching it from the west, until the engines are within 50 feet of the crossing; that there is a heavy down grade from the west at and near such crossing; that all these conditions existed on July 30, 1907. The complaint further alleges that defendant was negligent in the following respects: (1) In not having a full train crew sufficient to manage its cars; (2) in not reducing the speed of its train to a rate not exceeding three miles an hour, when approaching the crossing; (3) in not sounding its whistle and ringing

its bell when within 900 feet of the crossing; (4) in not maintaining a watchman or automatic sounding signal, or other appliance to warn travelers of the approach of trains.

REVERSED.

For appellant there was a brief over the names of *Mr. William W. Cotton, Mr. Arthur C. Spencer, Messrs. Cochran & Cochran* and *Mr. James G. Wilson*, with oral arguments by *Mr. Spencer* and *Mr. Charles E. Cochran*.

For respondent there was a brief over the names of *Messrs. Ivanhoe & Hodgin*, with an oral argument by *Mr. Francis S. Ivanhoe*.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

The legal questions raised on appeal are so numerous that the most feasible method of discussing them will be to take each alleged ground of negligence separately, and consider it and the evidence and law applicable thereto. The first ground of negligence alleged is the failure of appellant to keep a watchman or automatic signal apparatus at the crossing where the accident occurred. The complaint alleges, and the evidence shows, that the highway, where deceased was traveling, crosses the railroad track at the east end of a long curving cut, which prevents any view of the track, for quite a distance on its southerly side, for 150 feet or more before the highway reaches the track. There is a very steep grade toward the track, being practically level at the crossing. In order to see down the track it is necessary for a traveler to practically be upon it, and even then a curve prevents his seeing very far. The town of Perry is a small lumbering hamlet, containing a population of about 300 people, part of whom reside on the hill south of the railroad and the remainder north, below the hill. The evidence discloses no other way of connection by wagons than the highway in question. There can be no doubt but this was a "blind crossing," more than usually danger-

ous to travelers, both by reason of its proximity to the cut, and from the fact that it formed part of a connecting link between the two divisions of the village. An added danger arose from the fact that there was a dam in the river at this point, the roaring of which rendered it difficult to hear and locate trains. A sawmill nearby also furnished an additional voice to the general chorus. There was testimony that at times, and under certain conditions, the echoes from the high walls of the canyon—through which the road passes—so reverberated the sound of trains and whistles as to deceive travelers into the belief that trains coming from the west were coming from the opposite direction.'

1. Under these conditions, and in this state of the testimony, the court, against the objection of defendant, left to the jury the question whether defendant was negligent in not keeping a watchman, at the point where the accident occurred, to warn travelers. We do not think this was error. It goes without saying that it is the duty of a railroad company to use all reasonable precautions to protect the traveling public from injury from the necessarily dangerous agencies employed by it in carrying on its business. As a corollary to this proposition, it follows that such precautions should be such as are reasonably commensurate with the dangers incident to a particular situation or locality. What would be reasonable precaution at a crossing where the view of the track is open and unobstructed, might be gross negligence at one where the surroundings make such an inspection by the traveler impossible or unreasonably difficult. Their duty is a shifting obligation, depending upon the circumstances of each particular case.

2. To require a flagman or automatic signals at every crossing would be to entail upon railroad companies an intolerable burden and expense. To even require such precautions at every crossing where the view of the track is obstructed would be going farther than justice or

sound law will permit, but there are situations peculiarly dangerous, such as the one described in the testimony for respondent. In a case where it is claimed that there was an obstructed view of the track, which was upon a heavy descending grade, a highway approaching it upon a like grade, a waterfall and sawmill in the neighborhood, to prevent the trains being heard, and possibly a reverberation in the canyon that was calculated to deceive the ear as to the direction of sounds, we think it is proper for the court to submit to the jury the question whether defendant was negligent in not providing a watchman, or some automatic signal, to warn travelers of the approach of trains, especially where the crossing was not a country crossing, but in a village of 300 inhabitants, and the only crossing by which teams could go from one part of the town to the other, and one which of necessity must have been used by a great number of people. The authorities are not uniform upon this subject, some going even beyond the doctrine that we here hold applicable to the case at bar, and others holding that, unless some statute requires a flagman or automatic warning, a railway company is not negligent in failing to provide one.

3. A full citation of decisions on this subject would prolong this opinion to an unnecessary length, but, as this is the first time this court has been called upon to directly decide it, a reference to some of the leading text-books on this subject, will not be out of place. Thompson, Neg. (Volume 2, § 1527), says:

"On the one hand, it has been held that a railroad company is not required, in the exercise of reasonable care and diligence, to maintain a gate and gateman at all crossings, but that there must be peculiar hazard at a particular crossing to render it negligent in failing to maintain a gate and gateman thereat; and whether there is such hazard is a question for the jury. * * The Court of Appeals of Kentucky have used the following language on this subject, which has been quoted with approval by the Supreme Court of the United States: 'The doctrine with reference to injuries to those crossing the track of

a railway, where the right to cross exists, is that the company must use such reasonable care and precaution as ordinary prudence would indicate. This vigilance and care must be greater at crossings in a populous town or city than at ordinary crossings in the country, so what is reasonable care and prudence must depend upon the facts of each case. In a crossing within a city, or where the travel is great, reasonable care would require a flagman constantly at the crossing, or gates or bars, so as to prevent injury; but such care would not be required at a crossing in the country, where but few persons pass each day. The usual signal, such as ringing the bell and blowing the whistle, would be sufficient.' While the common law does not attempt to designate the mode in which sufficient notice of a train's approach to a crossing is to be given, and there is no common-law duty to have a flagman or gates at crossings, unless peculiar circumstances require it, the absence of flagmen and gates may be taken into consideration by the jury, together with other facts, to determine the rate of speed consistent with public safety at a given point. In other words, the question whether a railroad company has been guilty of negligence in not maintaining gates and flagmen at a highway crossing, in the absence of a statute or municipal ordinance requiring it, will ordinarily be a question for the jury; and this is merely a branch of the general doctrine that what precautions are reasonably necessary for the safety of the public at such crossings is for the jury to determine."

Criticising the opposite view, the same author says:

"This doctrine which commits the public safety to the tender mercies of the railroad companies until the legislature intervenes ought not to invoke one word in its favor." 2 Thompson, Neg., § 1537.

And again, at section 1526, he states:

"With the development of electrical science and the improvements in electrical appliances, electric bell signals at railway crossings are coming into use. It is understood that these bells are so arranged and connected as to be sounded by a current of electricity, communicated from an approaching train when it arrives within a given distance of the crossing. Doubtless it will soon become a recognized rule of law that the failure to have such a

signal at a crossing, in the absence of any other adequate means of protecting travelers, will be evidence of negligence to go to a jury."

We quote these paragraphs not to indicate the kind or measure of protection which the law requires at any particular crossing, but to show that the question of their absence at a dangerous crossing is a matter from which a jury has a right to infer negligence, if, in their judgment, the evidence shows that such precaution is necessary to afford reasonable protection to the traveling public: Patterson, Railway Accident Law, § 157. The decisions are not at all uniform on this subject, but we believe that reason and the weight of authority support the views taken by the text-writers above quoted. But we do not wish to be understood as holding that the necessity for a flagman, or warning signal, is in all cases a question which ought to go to a jury. It is only necessary for us to hold, so far as this case is concerned, and in any other case where the undisputed testimony shows extraordinary dangers, that it is not error for the court to submit to the jury the question whether reasonable care for the safety of the traveling public demands that a watchman or other method of warning than the use of the bell and whistle be adopted.

4. The second ground upon which plaintiff predicated negligence on the part of defendant was neglect to have a full crew of train hands, whereby plaintiff claims that defendant was unable to safely operate its train, and that the train thereby was behind time. It appears from the testimony that one of the brakemen had been injured and left at Pendleton on the down trip, and that when the train returned, going east, he did not report for duty, and the train proceeded on its way without him. He was a brakeman in name only, as the train was equipped with air brakes, and managed entirely from the engine. His duty was confined to handling freight, and otherwise assisting with the actual work of the train. There was

some evidence, from the conductor, that he was compelled to take the brakeman's place at stations along the way, and that this might have delayed the train perhaps half an hour but there was nothing to indicate that the train was run at any different speed, or managed in any different way, than it would have been had the brakeman been at his post. The only, if any, difference, occasioned by his absence was in the fact of the train having been rendered thereby half an hour late.

5. Defendant's counsel requested the court to instruct the jury to disregard the testimony, and the allegations in the complaint, in regard to the sufficiency of the train crew. This instruction was refused, which was error. There is no law which requires a train to be on time at stations, and certainly no rule that requires a freight train to be on time. The plaintiff's argument is practically this: Defendant's train had one man less than a full crew. By reason of that fact it was half an hour late, and, by reason of being half an hour late, it reached the crossing just at the instant deceased did. Therefore deceased's death was brought about by the negligence of the defendant in not having another brakeman.

6. A person is liable for any act the injurious consequences of which an ordinarily prudent man would be likely to foresee and guard against. Prudence and foresight raised to the fourth power hardly would have foreseen that the lack of a brakeman would have delayed the train at any particular crossing till its arrival would exactly coincide with the arrival, upon the track, of a traveler who might thereby be run against and killed.

7. As negligence cannot be predicated upon the mere fact that a train is behind time, it matters not from what particular cause the delay arose. If this had been a train managed by hand brakes, another question might have arisen as to whether there were a sufficient crew to keep the speed properly under control; but, for reasons before stated, that question cannot arise under the state

of facts shown in this case. In instruction No. 19 of defendant's abstract, the duty of a railway company to man its train with a sufficient crew is affirmatively stated to the jury. This instruction could have reference to nothing else than the want of a brakeman; and, in view of the evidence, and of defendant's request to take this alleged cause of recovery from the jury, it was misleading, and the giving of it was error.

8. The next ground of negligence alleged in the complaint is the failure to reduce the speed of the train when approaching the crossing. It may be premised that no rate of speed of trains, however high, is negligence *per se*. The usefulness of railways would be seriously impaired if they were compelled to run at such a rate of speed, even at crossings, that travelers, careful or careless alike, would be safe. "The very purpose of locomotion by steam upon railways is the accomplishment of a high rate of speed in the movement of passengers and freight. It is authorized by law that a railroad company, in propelling its trains at high speed along its tracks in the open country, is simply engaged in the lawful exercise of its franchise. If it is an evidence of negligence that a train is run at this rate of speed, it must be because running at a less rate is a legal duty; but there is no such duty established either by statute or decision. While there may of course be circumstances which require a diminished speed, it is only the force of these circumstances which creates such a duty." *Reading R. Co. v. Ritchie*, 102 Pa. 425.

9. With this general, but wholly fair, statement of the law in mind, it becomes pertinent to inquire what circumstances, on the part of a railway, create a duty to slacken the speed of its trains. And we find that dangerous and obscured crossings where there are no gates or flagmen, are spoken of as prominent in this respect. 2 Thompson, Neg., § 1875; Patterson, Railway Accident Law, §§ 157, 158. The crossing where this accident happened was

shown to be very dangerous in many respects. Making allowance for the tendency to exaggerate facts, when a railway corporation is defendant, which is too frequently apparent in cases of this kind, there is some very credible testimony, which tends to show that the crossing was an exceedingly dangerous one, and it was proper, under all the circumstances, for the court to submit the question of reasonable speed to the jury.

10. Defendant's requested instruction No. 56 probably states the law correctly if a jury of lawyers had been impaneled to try the cause. It reads:

"I instruct you that the convenience of the public and commercial industry demand the conveyance of passengers and freight at a greater speed than can be accomplished by ordinary conveyance; that the railroad cannot be required to slow down its trains or run at such a rate of speed across country crossings, or those in small villages, as will preclude the possibility of accident. Such requirements would be incompatible with rapid transit required of such companies. No rate of speed across a country crossing, or one in a small village, is of itself negligence; and, if you find from the evidence that the rate of speed at which said train was being operated was consistent with the obligation resting upon the company, then and in that event you cannot find the defendant guilty of negligence on account of the rate of speed at which said train was being operated."

Now, under our present system of selecting jurors, we get a body of men in the box whose capacities range from the well-educated to the ignorant man. An educated man, if he had this instruction with him, would probably be able to gather from it that a railroad company had a right to run its trains at any speed across a country crossing, which is only true in a qualified sense; but even he would find himself nonplussed when he came to inquire what "the obligation resting upon the company" really meant. And, unless he had a considerable acquaintance with railway accident law, he would remain in darkness.

11. Unless an instruction is so definite as to enable a man of average intelligence to understand it, it ought to be refused as misleading and tending to confuse, rather than instruct, a jury. A court is not bound to give, and ought not to give, an instruction, even though it states the law correctly, which is not couched in language sufficiently untechnical to be comprehended by the average juror. Requests for instructions are permitted so that the jury may be fully informed as to the law, and not to enable litigants to ensnare an unwary court into technical error which will secure a reversal in case of defeat. There was no error in refusing this instruction.

12. The last alleged ground of negligence, upon which evidence was introduced, is upon the alleged failure to blow the whistle and ring the bell. There is the usual conflict of testimony on this subject. One witness testified that the whistle was not sounded, that he was near the whistling station when the train passed, and that his father, who was with him, spoke, at the time, about the failure to whistle. Others testified that they did not hear the whistle, though shown to have been in a position where they might have heard it, while some testified that they heard the train whistle. The engineer and fireman testified that the whistle was blown. The jury had a right to find either way on this question, and the result shows that they found neither way. The court submitted a special interrogatory on this part of the case, and the jury reported that they were unable to agree on that point. Thereupon the court instructed them that they could return a general verdict, and report a disagreement, as to the special matter submitted to them, which they did. From this it is evident that the failure to whistle was not one of the grounds of negligence upon which the jury were agreed in finding their verdict. When the jury fails to agree upon the answer to an interrogatory, but returns a general verdict, the effect of

such failure to agree is to eliminate from the case the matter embraced in the interrogatory, at least so far as it is sought to make such matter a substantive ground for recovery.

13. If negligence, in respect to sounding the whistle, had been the only ground upon which plaintiff sought a recovery, the answer of the jury—that they could not agree as to whether the whistle sounded—would have been practically a disagreement as to whether the respondent should recover at all. *Tourtelotte v. Brown*, 1 Colorado App. 408 (29 Pac. 130). But if several grounds of recovery are alleged, and the interrogatory goes only to one of them, the general verdict will stand, notwithstanding the failure of the jury to agree upon an answer to the interrogatory, as it will be presumed that the jury based their verdict upon some other ground than the one concerning which the court asked a special finding. *Clementson*, Special Verdicts, 109; *Schneider v. Railroad Co.*, 42 Minn. 68 (43 N. W. 783).

14. In the case at bar the interrogatory was a very proper one under the circumstances; and, while it was within the discretion of the court to receive the general verdict, yet we venture to suggest—in view of a retrial—that, where the court, in the first instance, has decided to submit a special finding, it should hesitate to allow a jury to return a general verdict and ignore the finding. It leaves an unpleasant doubt as to whether the jury stood part for a recovery on one ground, and part for a recovery on another, or whether they rendered a verdict based on general principles and sympathy. A good verdict should be based upon some ground upon which all the jurors agree. *Parrot v. Thacher*, 9 Pick. (Mass.) 425. In the case last cited Mr. Chief Justice PARKER says: "We certainly do not mean to encourage the practice of questioning jurors as to the ground of their opinions; but, where there are

distinct grounds upon which the verdict may be given, perhaps it is not improper to ascertain which they adopted, as there may be little or no evidence upon one, and sufficient upon another, and, if it appears that they did not agree upon either of the grounds, I do not see how their verdict can stand; unanimity being required. If there are three distinct grounds upon which an action can be maintained, all independent of each other, and four only of the jury agree upon each, I do not see how they can amalgamate their opinions and make a legal verdict out of them."

15. Defendant in this case pleaded contributory negligence on the part of the deceased, and the evidence shows that he drove upon the track without stopping, looking, or listening, or apparently giving much attention to the train. It is true that one witness—the engineer—says that he looked to the east, the opposite direction from that of the approaching train. He could not see westward any great distance, and only his ears could have warned him of danger in that direction. It is possible that the alleged echo gave him a false idea of the direction from which the train was coming, or that no whistle was blown, or bell sounded, though this supposition rests on very slight evidence. In a man of mature years we would be inclined to hold that a case of contributory negligence was so satisfactorily made out that the verdict ought not to be allowed to stand. But we are not prepared to apply that rule to the case of a boy of the age of deceased. It is true he was shown to be a bright, intelligent boy, the equal, and perhaps the superior of many boys of his age. He had driven over this crossing nearly every day for over two weeks, and had been told by his father to be careful at the crossing. A lady had warned him to be careful, and he had answered that he knew enough to take care of himself, and, no doubt, with the self-sufficiency of youth, he thought he did. But with all his intelligence he was yet a child. He

"thought as a child and understood as a child," and in an emergency he would act as a child, and it would be a harsh rule that would hold him to the same strict accountability that would be required of a person of mature years. The decisions of the courts upon this subject are as various as the temperaments of the different judges, some courts holding a child of seven years to the strict rule of care. *Hughes v. Macfie*, 2 Hurl. & Colt. *744; *Mangan v. Atterton*, L. R. 1 Exch. 239. The brutal doctrine of the cases last cited has found little favor in America, and the general rule is that an infant is required to exercise just that amount of care in avoiding injury that the evidence shows him to be capable of. The authorities on this subject are all collated in Thompson, Negligence, and the length of this opinion makes it impracticable to further discuss them here: 2 Thompson, Negligence, § 1618, and cases cited.

16. While a boy of the general intelligence of the deceased, as shown by the testimony, approaches in some respects the standard of an adult, it is not for the court, as a matter of law, to say that he had the judgment, the power of reflection and discrimination, to appreciate the full extent of the danger at this crossing. This was a matter for the jury. We find no error in the rulings of the court upon the admission of testimony, and pass that branch of the case without further comment.

Counsel for defendant presented to the court a small treatise on the law of negligence in the form of requests for instructions, most of which the court refused to give, and such refusal is assigned as error. Had the court refused all of them on the ground that they were too voluminous to be properly considered, and therefore not calculated to enlighten the jury, the writer of this opinion, speaking for himself, and not for the court, would have been inclined to hold that course proper. The court was expected, during the argument of counsel, not only to

watch the progress of that argument, and see that it was kept within due bounds, but to formulate his own charge and examine the instructions submitted as to their pertinency and harmony with the law, and the jury were expected to remember and understand and apply all this dissertation to the facts of the case at bar. It has taken the writer of this opinion several days to examine these instructions, with a view to their legal sufficiency, and as a long-time sufferer at circuit, from requests for instructions that, by reason of their number, fail to instruct, and only tend to confuse, instead of clarifying the issue to be tried, he registers a protest against the growing tendency among lawyers to present requests for instructions covering the whole body of the law.

17. It was error for the court to allow the counsel for plaintiff to argue to the jury that the defendant was negligent in allowing the bluff to remain where it was. Counsel for plaintiff explains in his brief how the remark happened to be made; and if that explanation, or the basis of it, had been incorporated in the bill of exceptions, it would probably appear that no injury was done to defendant's rights by the argument objected to, but we are bound by the bill of exceptions, and cannot look outside of that to ascertain what took place.

18. We think the court erred in giving instruction No. 24 in defendant's abstract. That part of the instruction which we deem erroneous reads: "Plaintiff need not, however, prove that the defendant was negligent in all of the particulars alleged, but only that it was negligent in some of the particulars alleged," etc. Now one of the particulars alleged was the lack of a brakeman, which was, by this instruction, impliedly submitted to the jury, along with other alleged acts of negligence on the part of defendant, when it should have been affirmatively withdrawn from their consideration. Instruction No. 30 is faulty for the same reason.

As this case will have to be retried, we will briefly and without entering into any long discussion of the law, indicate our conclusions as to the requests of defendant. Request No. 34 was properly refused, as there was no evidence that the engineer saw the deceased at any time or place when he could have stopped the train or averted the accident. Instructions No. 35, 36, and 37 should have been given. Instruction No. 38 was properly refused. It attempts to apply to deceased the same rule, in regard to contributory negligence, that the law applies to persons of mature years. Instruction No. 39 is misleading, and is sufficiently covered by the general instructions. Instruction No. 40 should have been given. Instruction No. 41 should have been given. There was no error in the court's refusing instruction No. 42 of defendant's assignment of errors.

19. The court was asked to draw a comparison between the value of the evidence of the witnesses who testified that they heard the whistle and those who testified that they did not hear it. Under our statute "the jury are the sole judges of the value and effect of evidence," and for the court to say that the testimony of a witness who says that a thing actually occurred is of more value than that of one who says that he did not see the thing occur or hear it, would be approaching dangerously close to a comment on the evidence. The comparative value of such testimony depends upon the means of knowledge of the witness; his opportunity to have heard the whistle, if actually sounded, his apparent candor and general demeanor upon the witness stand.

20. We are aware that there are some decisions that go as far as the instruction requested by defendant in this case, and hold that such instruction should be given. This is notably true in Kansas and some other jurisdictions. *Missouri Pac. R. Co. v. Moffatt*, 56 Kan. 667 (44 Pac. 607). In other cases the courts have expressed opinions as to the comparative value of such testimony,

while themselves commenting upon the facts, in particular cases where the question as to whether the point should have been presented by way of an instruction to the jury was not involved. The case of *Chicago & Alton R. Co. v. Robinson*, 13 Am. & Eng. R. Cas. 620, cited by appellant, is an instructive case. There the court instructed the jury as follows:

"In an action against a railroad company, alleging negligence in not sounding the whistle or ringing a bell on approaching a road crossing, a jury may be justified in giving greater weight to the testimony of witnesses who state negatively that the whistle was not sounded or the bell rung, than to that of witnesses stating affirmatively that such was done."

Commenting on this instruction, the Supreme Court of Illinois say: "It is obvious error for the court to pronounce as to what is the better evidence in the case, or as to what the jury may so regard. It is the province of the jury to determine as to what evidence they will give the greater weight, and their privilege in that regard should not be interfered with by the court." The lower court in that case was at one extreme, and defendant in this case is at the other. Any instruction on the subject would have been an invasion of the province of the jury.

We find no other error in the charge of the court, or in its refusal of the requests of defendant. The general charge seems, with the slight exceptions already noted, to have been sufficient to fairly present the questions at issue in a manner within the comprehension of an average jury; but, for the errors heretofore specified, the decision of the lower court will have to be reversed, and the case remanded, with directions to proceed in a manner not inconsistent with this opinion.

REVERSED.

Argued April 6, decided June 29, 1909.

GERMAN SAVINGS & LOAN SOCIETY v. GORDON.

[103 Pac. 730.]

EASEMENTS—DEFINITIONS.

1. An "easement" is a right in one person to do certain acts on another's land, or to compel such other to refrain from doing certain acts thereon. In strictness the term does not include the authority of a landowner to use a way from her residence over land the legal title to which she retained for her own purposes.

EASEMENTS—SERVITUDE—"QUASI EASEMENT."

2. The owner of an entire tract of land or of two or more adjoining parcels may so employ a part thereof as to create a seeming servitude in favor of another portion to which the use becomes appurtenant. Such use is tantamount to an easement at will, so long as the unity of ownership continues, and is described as a "quasi easement."

EASEMENTS—QUASI EASEMENT—QUASI-DOMINANT TENEMENT—CONVEYANCE—EFFECT.

3. Where an owner of land creates a quasi easement in one portion of her land in favor of another portion, and conveys the quasi-dominant tenement without an express reference in the deed to the servitude, whether the easement passed by implied grant depends on the nature and character of the use imposed, as indicating whether the grantor intended to convey a right to use the quasi tenement, and the grantee reasonably expected to take and hold such right.

EASEMENTS—QUASI EASEMENT—CONVEYANCE—IMPLIED GRANT—CONTINUOUS AND APPARENT QUASI EASEMENT.

4. The grantee of a quasi-dominant tenement takes an apparent quasi easement by implied grant, provided the easement is one of reasonable necessity to the enjoyment of the property conveyed.

EASEMENTS—DISCONTINUOUS QUASI EASEMENT—IMPLIED GRANT.

5. A discontinuous quasi easement, when evidenced in a substantial manner, passes by implied grant as an appurtenant to the dominant tenement, when the latter is severed by a conveyance thereof.

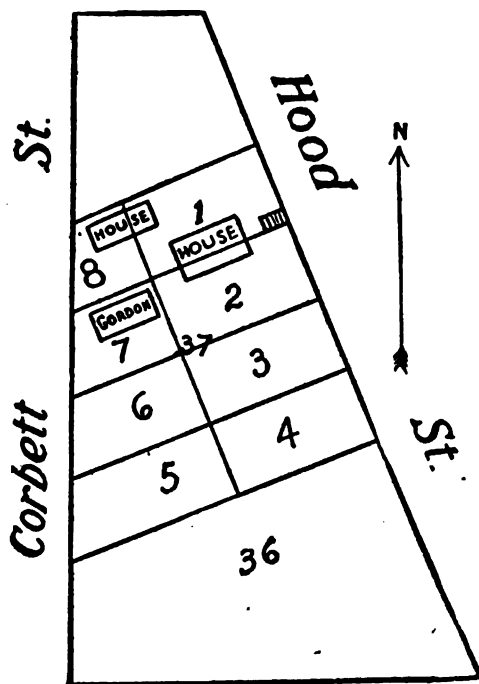
EASEMENTS—QUASI EASEMENTS—IMPLIED GRANT—CONVEYANCE OF DOMINANT ESTATE—SEVERANCE.

6. G., while the owner of four lots in a city block numbered 1, 2, 7, and 8, lots 1 and 2 facing on H. street and 7 and 8 in the rear facing on C. street, sold lot 7, reserving a passageway 5.125 feet wide, extending from C. street to the rear of lot 2, on which her house was partially located. G. built a picket fence on the south line of lot 8, just north of the passageway. The entrance to the passageway was originally indicated by a gate, and was reached by three ascending steps from the street grade and covered by a two-board walk, which extended eastward across the lot past the house of the purchaser of lot 7, who built a fence from the northwest corner of his house along his boundary to C. street, so that the passage was inclosed to the rear of his house, and from there on was not fenced. The gate, when closed, completed the angle and connected the south line of G.'s fence with the west line of the fence of the owner of lot 7. G. mortgaged lots 1 and 2 without reference to the right of way, which mortgage was thereafter foreclosed. *Held*, that the purchaser at the foreclosure sale acquired the right to use the passageway as a quasi easement appurtenant to lot 2.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Statement by MR. CHIEF JUSTICE MOORE.

The following is a plat showing the property and way in controversy:



This is an appeal by the defendant, George W. Gordon, from a decree enjoining him from obstructing an alleged private way over part of his land on which the plaintiff, the German Savings & Loan Society, a private corporation asserts that it has an easement, as an incident to its ownership of adjoining land. The facts are that on January 30, 1891, Mrs. Leaner Gray, being the owner of lots 1, 2, 7, and 8, in block 37, of Caruther's addition to Caruther's addition to the city of Portland, conveyed to Gordon the south 50 feet of lot 7, reserving to herself the north 5.125 feet thereof. Lot 2 lies immediately

south of lot 1, and both are bordered on the east by Hood street. Lots 7 and 8 join lots 2 and 1, respectively, and extend west to Corbett street. Gordon, soon after purchasing his land, built thereon a house, the north line of which was near his north boundary. Mrs. Gray was then living on lots 1 and 2 in a house which fronted east. She built on the south line of lot 8 a picket fence, between which and Gordon's house she caused to be constructed a passageway from Corbett street to the rear of her building. The entrance to the passageway was originally indicated by a gate, and, as the lots were somewhat higher than the street grade, three ascending steps led from the gate to a two-board walk which extended eastward across the lot past Gordon's house, at the end of which walk were five descending steps. Gordon built a fence from the northwest corner of his house, along his boundary to Corbett street, so that the passageway was inclosed to the rear of his house, but east thereof the walk was not fenced. The gate referred to when closed completed the angle and connected the south line of Mrs. Gray's fence with the west line of Gordon's fence. Such was the condition of the land described September 17, 1892, when Mrs. Gray, in order to secure the payment of \$6,600, executed to plaintiff a mortgage on lots 1, 2, and 8, in block 37 of the addition specified, together with the appurtenances, etc. Default having been made in the payment of an installment of the debt, the mortgage was foreclosed, the premises were sold to the plaintiff, the sale was confirmed, and a sheriff's deed was executed to the purchaser November 27, 1896. The mortgagor vacated the premises, and, the plaintiff taking possession thereof, its tenants continued to use the passageway until it was closed by Gordon, to whom Mrs. Gray on January 25, 1906, conveyed the north 5.125 feet of lot 7. To restrain such obstruction this suit was instituted, resulting in a decree as hereinbefore stated.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Andrew T. Lewis*.

For respondent there was a brief and an oral argument by *Mr. Milton W. Smith*.

Opinion by MR. CHIEF JUSTICE MOORE.

1. The question to be considered is whether or not a right to use a passageway was impliedly granted by the mortgage, so that, upon the foreclosure thereof and a sale and conveyance of the premises, an easement became appurtenant thereto. An easement is a right in one person to do certain acts on another's land, or to compel such other to refrain from doing certain acts thereon. *Tiffany, Real Property*, p. 677.

2. As Mrs. Gray placed the stairs and walk on her own land, the legal title to which she retained for that purpose, her authority to use the way cannot be denominated an easement within the strict definition of that word. The owner of an entire tract of land, or of two or more adjoining parcels, may so employ a part thereof as to create a seeming servitude in favor of another portion to which the use becomes appurtenant. *Lampman v. Milks*, 21 N. Y. 505. Such use is tantamount to an easement at will, so long as the unity of ownership continues. *Elliott v. Rhett*, 5 Rich. Law (S. C.) 405 (57 Am. Dec. 750, 759). The servitude referred to is known as a quasi easement. *Tiffany, Real Property*, § 315. "The servitude of the civil law," say Mr. Chief Justice LEWIS, in *Kieffer v. Imhoff*, 26 Pa. 438, 442, "has a much wider signification than the easement of the common law comprehending many rights, which in the latter fall under the division of *profits a prendre*." Though there is a distinction between the terms adverted to, the word "servitude" where employed in this opinion will be used as synonymous with the phrase "quasi easement."

3. When the quasi-dominant tenement is conveyed, without an express reference in the deed to the servitude,

the quasi easement is occasionally held to have been impliedly granted, and at other times not to have passed, depending upon the nature and character of the use imposed upon the quasi servient tenement by invoking the presumption that the parties contracted with reference to the conditions of the property at the time of the sale, and that the grantor intended to convey a right to use the quasi easement, and that the grantee reasonably expected to take and hold such right. 10 Am. & Eng. Enc. Law 422; *John Hancock M. L. Ins. Co. v. Patterson*, 103 Ind. 582 (2 N. E. 188: 53 Am. Rep. 550).

In *Phillips v. Phillips*, 48 Pa.178 (86 Am.Dec.577,580), in speaking of a quasi easement, which survives a severance of the tenements by a conveyance of the quasi dominant estate, and which servitude passes by implied grant, Mr. Justice THOMPSON observes: "It is not to be understood by this doctrine that any temporary convenience adopted by the owner of property is within it. By all the authorities it is confined to cases of servitudes of a permanent nature, notorious, or plainly visible, and from the character of which it may be presumed that the owner was desirous of their preservation as servitudes, evidently necessary to the convenient enjoyment of the property to which they belong, and not for the purpose of mere pleasure." The courts of the common law, borrowing the terms from the Code of France, recognize, *inter alia*, the classification of servitudes into continuous and discontinuous, in defining which a text-writer says:

"Continuous are those of which the enjoyment is or may be continual without the necessity of any actual interference by man, as a water spout or a right of light or air. Discontinuous are those the enjoyment of which can be had only by the interference of man, as rights of way, or a right to draw water." Washburn, Easements (2 ed.), § 13. "The test of continuousness," says a text-writer, "is that there is an alteration or arrangement of a tenement which makes one part of it dependent in some measure upon another. This alteration or arrangement

must be intended to be permanent in its nature." Jones, Easements, § 143.

It is generally held that, upon the conveyance of a quasi-dominant tenement, a quasi easement appurtenant thereto which is continuous passes by implied grant. 14 Cyc. 1168. Where the owner of land makes one part of it servient to another by an obvious and reasonably permanent alteration, and conveys the dominant part, his grantee takes such portion benefited by the easement which the change effected. *Cihak v. Klekr*, 117 Ill. 643 (7 N. E. 111); *Kelly v. Dunning*, 43 N. J. Eq., 62 (10 Atl. 276); *Simmons v. Cloonan*, 81 N. Y. 557. An author states this legal principle as follows:

"The rule is general that, where one conveys a part of his estate, he impliedly grants all those apparent or visible easements upon the part retained which were at the time used by the grantor for the benefit of the part conveyed and which are reasonably necessary for the use of that part." Jones, Easements, § 129.

It is held by some of the state courts of last resort that the grantee of a quasi-dominant tenement does not take by implied grant a continuous and apparent quasi easement, except in cases where such servitude is a necessity. 14 Cyc. 1168. The weight of authority, however, supports the doctrine that "reasonable necessity" is the proper gauge for determining whether or not the servitude passes by implied grant. 10 Am. & Eng. Enc. Law (2 ed.), 424; Tiffany, Real Property, § 317.

5. The rule generally obtains that a discontinuous quasi easement does not pass upon a conveyance of the dominant tenement, unless the deed is sufficient in form expressly to create a servitude *de novo*. 14 Cyc. 1168; Jones, Easements, § 145; *Kelly v. Dunning*, 43 N. J. Eq. 62 (10 Atl. 276). An exception to this rule is recognized where the quasi easement consists of a formed or an inclosed road or way. Jones, Easements, §§ 254, 265. Thus a lane evidenced by fences, and used as a private way in

connection with a quasi-dominant tenement, was held by the Supreme Court of Pennsylvania to have passed as an appurtenant upon a severance of the premises by an implied devise of the servitude. *Phillips v. Phillips*, 48 Pa. 178 (86 Am. Dec. 577). The deviation from the general rule adverted to has been followed by the court which first formulated the exception. *Overdeer's Adm'r v. Updegraff*, 69 Pa. 110, 119. In that case, though the easement was specifically mentioned in the grant, the court, referring to the servitude, remarks: "But if there had been no express reservation of the right to the use of the alley in the conditions of sale, and in the deed executed and delivered to the purchaser, the latter would have taken it subject to the servitude imposed upon it by the decedent for the use and benefit of the occupants of the adjoining lot. It was a continuous and apparent easement, and the law is well settled that in such a case the purchaser, whether at private or judicial sale, takes the property subject to the easement." It will be observed from the language last quoted that the word "continuous" is used to qualify the word "easement." As the servitude there referred to was an alley, it is difficult to understand how the way could have been designated as "continuous." That part of the opinion set forth herein was evidently not necessary to a decision of the question involved. In *Cannon v. Boyd*, 73 Pa. 179, 181, land that was subject to a mortgage was platted by the owner of the premises who built on two adjoining lots, on one of which was an alley that was used in connection with the other lot. The land was sold in distinct lots under the mortgage, and it was determined that the first lot was sold subject to the use of the alley, although no reference was made to it in the sheriff's deed. In deciding that case, Mr. Justice WILLIAMS, speaking for the court, says: "Where a continuous and apparent easement or servitude is imposed by the owner on one portion of his real estate for the benefit of another, the law is

well settled that a purchaser at private or judicial sale, in the absence of an express reservation or agreement on the subject, takes the property subject to the easement or servitude." It will be seen that the word "continuous" is again used by that court to qualify a servitude which was discontinuous. Though the cases which thus follow the authority of *Phillips v. Phillips*, 48 Pa. 178 (86 Am. Dec. 577, 580), relate to ways, and support the principal case, the use of the word "continuous," to which attention has been called, would ordinarily seem to weaken the exception originally recognized.

It is believed, however, that the two later decisions adverted to are based on the facts involved, and not on a misconception of the legal principle applicable thereto, and that the word "continuous" was inadvertently used. It is possible that such word was employed to express the idea that the way had been continuously used, and not to indicate a "continuous" quasi easement within the commonly accepted meaning of that term. If so, the word was inaccurately used, and the conclusion reached in the two cases cited is compatible with the exception noted in the original case. It may be that the word "continuous" as thus employed was used as a synonym for "apparent." Such meaning has been given to the terms. Thus in *Fetters v. Humphreys*, 18 N. J. Eq. 260, 262, in referring to the subject, it is said: "A privilege or right attached to one tenement or parcel of land to enjoy some benefit in or over another tenement or parcel, is called an easement of the dominant tenement, to which it belongs, and a servitude upon the servient tenement or that in which it exists. These easements are either apparent and continuous, or not so. Apparent or continuous easements are those depending upon some artificial structure upon, or natural formation of, the servient tenement, obvious, and permanent, which constitutes the easement or is the means of enjoying it. As the bed of a running stream, an overhanging roof, a pipe for con-

veying water, a drain, or a sewer. Non-apparent or non-continuous easements are such that have no means specially constructed or appropriated to their enjoyment, and that are enjoyed at intervals, leaving between these intervals no visible sign of their existence, such as a right of way, or right of drawing a seine upon the shore." If the interpretation thus imparted be correct, it follows that there is no inconsistency in the Pennsylvania cases, to which attention has been called. In *Martin v. Murphy*, 221 Ill. 632 (77 N. E. 1126), the syllabus is as follows: "Where the owner of several lots having no alley at the rear builds a walk, making a passageway from the inside lot across the others, upon the conveyance by such owner of one of the lots without reference to the passageway across it being made in the deed, an easement of passage becomes at once appurtenant to the other lots if the marks of the burden be open and visible, and passes with such lots whether mentioned in the deeds of conveyance or not, and each subsequent purchaser takes subject to the easement in favor of the other lots, as it is apparent from an inspection of the premises at the time of the purchase." In that case the quasi easement was bounded on one side by a brick wall and on the other by a fence. A door indicated the entrance to the way which servitude was first evidenced by a plank walk, but later relaid with cement. Other gates swung across the passage, marking the boundaries of the several owners of the property as divided by their grantor. It was there ruled that the way was reasonably necessary and sufficiently indicated to impose on the parties purchasing the property, notice of the existence of the quasi easement. The Supreme Court of Illinois, after calling attention to its own decisions relating to discontinuous easements that pass by implied grant, makes the following observation: "There is a conflict among the authorities outside this State as to whether the principles of law which we have above stated are applicable to a case involving a right of way.

That no such distinction exists in this state between a right of way and other easements is apparent from an examination of the cases above cited, as the controversy in most of them was in regard to the existence of a right of way." In *Baker v. Rice*, 56 Ohio St. 463, 477 (47 N. E. 653, 656), a way was held to have passed by implied grant upon severance of the quasi dominant and servient tenements. In deciding that case Mr. Justice MINSHALL says: "But it is claimed that only such easements as are termed 'continuous' will pass by implication in a grant, and that such as are termed 'discontinuous' will not. This is a distinction of the civil law, and has been incorporated in the law of some of the states, particularly Maine and Massachusetts. The former are such as operate without the intervention of man, such as drains and sewers. The latter require the intervention of man in their use, such as ways. The distinction is somewhat arbitrary, and is not uniformly adopted, as will appear from the cases cited. The better rule, and the one now more generally adopted, is not to consider the particular kind of easement, but whether it is apparent, designed to be permanent, and is reasonably necessary to the use of the premises granted." We are unable to discover any valid reason for a distinction in the rules of law applicable to servitudes depending upon whether they are continuous or discontinuous, except in the matter of the greater conspicuity which the former usually affords. An artificial ditch in which water regularly flows must necessarily be a constant reminder to all beholders of the changed condition of the surface of the earth whereby the dominant tenement is drained or irrigated by the conduit which is appurtenant thereto. *McDougal v. Lame*, 39 Or. 212 (64 Pac. 864). Water thus flowing through lands and necessary for their use passes as an appurtenant with a conveyance of the premises. *Simmons v. Winters*, 21 Or. 35 (27 Pac. 7: 28 Am. St. Rep. 727).

A discontinuous quasi easement when evidenced in a similar substantial manner ought to pass by implied

grant as an appurtenant to the dominant tenement when the latter is severed by a conveyance thereof. The reason for this deduction is ably stated by the court in *Phillips v. Phillips*, 48 Pa. 178 (86 Am. Dec. 577, 581), as follows: "It may be granted that the continuance of drains, water pipes, and mill races may more distinctly indicate their permanent and essential nature than a mere private way; but, when the permanency of the way is proved, confessed, or not disputed, this difference vanishes. They stand on the same footing."

6. In the case at bar, though the plaintiffs' tenants can pass over its own land across lot 8 to Corbett street, so that the passageway is not an absolute necessity, we are satisfied that the stairs and walk as laid by Mrs. Gray serve as a more convenient way, and believe them to be reasonably necessary to the enjoyment of the property at the time the mortgage was given, and as the quasi easement across Gordon's land was fenced on the north and inclosed on the south by the north wall of his house, and by the fence extending from the northwest corner of his dwelling to Corbett street, the passageway was apparent, being indicated on the ground with such a degree of permanency as to afford notice that its existence was designed to be permanent; and in our opinion it passed as an appurtenant by the implied grant.

It follows from these considerations that the decree should be affirmed; and it is so ordered.

AFFIRMED.

Argued May 4, decided July 6, 1909.

BRASEL v. OREGON R. & N. CO.

[102 Pac. 726.]

MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE OF SERVANT.

1. Plaintiff was an old and experienced workman, whose work in part was cleaning locomotive boilers, both in and out of repair, so that he could not fail to know that there was a possibility that an engine on which he was required to work would be undergoing repairs. Before beginning on an

engine he consulted the engineer's work report, which contained items of repairs to be made thereon, and though the item requiring the boiler to be cleaned was first on the report, and he did not read further, he could not help seeing that other items thereon called for other work on the engine, so that he was put upon notice that other work was to be done. Before he began work the jacket and hand rail on the side of the engine had been removed by other workmen, and plaintiff, without inspecting the boiler to avoid danger, climbed onto the running board with a hose, and, losing his balance, fell off, because there was no hand rail to hold to, and was injured. *Held*, that he was negligent, and could not recover.

MASTER AND SERVANT—ASSUMPTION OF RISK—NEGLIGENCE OF FELLOW SERVANT.

2. Plaintiff and the other workmen working on the engine being fellow servants, he assumed the risk of the other's negligence, if any, and the master's foreman owed no duty to caution each one to beware of the operations of the others.

MASTER AND SERVANT—ASSUMED RISKS—NECESSARY INCIDENT OF EMPLOYMENT.

3. The removal of the hand rail being a necessary part of the labor to be done on the engine, the risk of injury from its absence was a risk assumed by plaintiff.

From Union: JOHN W. KNOWLES, Judge.

Statement by MR. JUSTICE MCBRIDE.

This is an action brought by Ezra S. Brasel on account of injuries received by him from a fall from the running board of one of defendant's locomotives. Plaintiff was employed by defendant, at its roundhouse and repair shop at La Grande, as a boiler washer and cleaner.

The complaint alleges, in substance, that on the day of the accident he was engaged in washing and cleaning a boiler, in defendant's roundhouse, by means of a hose furnished by defendant; that, for the purpose of access to such boiler, it is the custom, and necessary, to have a foot-board, commonly called a "running board," for the use of employees while working upon the engine, and that such board actually was so attached and in place at the time of plaintiff's injury; that it is the custom, and is necessary, required, and indispensable, for the safety of employees, while engaged in washing or cleaning boilers, to have in place on the engines and boilers, above the running board, a rail, called a "hand rail" so situated that employees, while walking or standing on the running board, may grasp it and prevent themselves

from falling, and that the rail was particularly necessary and indispensable for the safety of plaintiff in the kind of labor he was there performing, and its absence rendered the place unnecessarily dangerous and unsafe; that at the time plaintiff was performing his work a steam pipe had been partially detached and allowed to extend four or five inches from its accustomed place away from the boiler and toward the foot board, and that plaintiff had no notice or knowledge of the condition of the pipe when he began work, and no notice or knowledge that it was not in its customary place; that defendant had carelessly and negligently removed the hand rail from the boiler and engine before plaintiff went to work, and that plaintiff had no notice or knowledge that it had been removed; that, while on the running board in the prosecution of the work, the nozzle of the hose struck against the projecting steam pipe and caused him to lose his balance; and thereupon, to save himself from falling, he attempted to grasp the hand rail, but, by reason of its having been removed, he fell and fractured his leg. The complaint is very full in its allegations of negligence, but, for the sake of brevity, all but a bare outline is omitted.

The answer denies the material allegations of the complaint, and alleges contributory negligence, the negligence of fellow servant, and assumption of risk. The verdict and judgment were for defendant, and plaintiff appeals.

AFFIRMED.

For appellant there was a brief with oral arguments by *Mr. Leroy Lomax* and *Mr. Gustav Anderson*.

For respondent there was a brief over the names of *Mr. William W. Cotton*, *Messrs. Cochran & Cochran*, and *Mr. Arthur C. Spencer*, with oral arguments by *Mr. Charles E. Cochran* and *Mr. Spencer*.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

The evidence of plaintiff and his witnesses tended to show that the roundhouse and repair shop of defendant

was a building semi-circular in form, not very well lighted, but sufficiently light to enable a workman to prosecute his labors without the aid of artificial light; that the engine in question had been brought into one of the stalls in the roundhouse and "spotted" for repairs; that, according to the regular custom, the engineer of the locomotive in question had filed his report, which was entitled in capital letters as follows:

ENGINEER'S CONDITION OF ENGINE AND WORK REPORT.
WORK NEEDED.

Wash boiler.

Stay bolts leaking outside and inside of cab.

Straight air will not work.

Injector steam pipes leak at union on valve.

Inside of cab, air leaks bad.

Put dope plug on R. B. side rod.

Clean out gauge cocks.

The custom of the employees was to look over this report and then get their orders from the superintendent. Plaintiff testifies that, before going to work on the engine, either he or his helper blew it off, and while it was cooling he was engaged in some other part of the building. He also assisted in placing blocks under the wheels preparatory to beginning work. At noon his helper told him that the boiler was ready to wash, and he went back and began his work. While he was away, however, and before he returned, workmen engaged in other repairs had removed a section of the jacket from the engine and taken off the hand rail, in order to get at the stay bolts, which required some repair, and had left the steam pipe projecting a few inches from the boiler and above the running board, which is about 20 inches wide, running the entire length of the boiler and about four or five feet below the hand rail, which may be grasped by persons using the running board to steady themselves when necessary. The plaintiff walked from the front to the rear end of the engine and used the

hose, in washing the engine, at one of the plugs just in front of the cab, and moved forward to insert the nozzle of the hose in another plug, and, while so doing, struck the nozzle on the projecting steam pipe and fell. He testified that he grabbed for the hand rail, and that if it had been in place he could have saved himself; that he had not observed the absence of the rail, or the fact that part of the jacket had been removed, or that the steam pipe was out of place; that the water in the hose was turned off at the nozzle, which, together with the fact that it was a new hose and very stiff, and that there was a heavy pressure of water from the pump, made it hard to handle, so that he had to pass it between his legs and hold the nozzle with both hands, in order to handle it, and that this took all his time and attention. Plaintiff also testified that he sometimes washed boilers when they were stripped, and sometimes otherwise, but very seldom washed one in this condition. His helper, Mr. Collyer, testified to the same general state of facts, and saw that the locomotive was stripped and the steam pipe out of place before plaintiff went to work. He stated that they sometimes washed boilers with the jackets off but not often. In order to do the work necessary to repair the engine it was essential to take the jacket off the boiler. After plaintiff was hurt he finished washing the boiler without the hand rail being attached. Kenneda, another witness, testified that he went to the engine immediately after the accident; that as soon as he came by the side of it he noticed that the steam pipe was projecting, the jacket stripped, and the hand rail gone, indicating that repairs were being made, though no one was working at the time. Leavitt, another witness, testified to the general situation in the roundhouse and was present just after plaintiff fell. On cross-examination witness testified that when a boiler was ordered to be washed the employee would usually do a great deal of work on it, because it was almost a certainty that it would be

in all day, and they would figure on doing considerable work on it. Plaintiff also testified that on the morning of the accident he looked at the engineer's report under the head of "work needed," but as the words "wash boiler" came first he did not read the remainder. The general tendency of the evidence, of which the foregoing is only an outline, tended to show that plaintiff's injury would not have occurred if the hand rail and steam pipe had been in their usual positions.

1. We do not see how plaintiff could possibly recover in this case. He was an old and experienced workman, and his business was carried on in a place devoted, in part, to the repair of locomotives. He had been called upon to wash and clean boilers upon locomotives which were in repair and out of repair, and could not fail to know that there was a probability or, at least, a possibility that the one upon which he was directed to work was being repaired. In addition to this he admits that he saw the engineer's report and read the first item, which was one pertaining to his own special duties. He says that he did not read the other items, but he could not glance at the first one without seeing that there were others, and thereby being put upon notice that this very locomotive would require other work done upon it than that which he was required to perform. In other words, both by the nature of his employment and the fact that a report of "work needed" had been subject to his inspection, he could not fail to be put upon notice that he might not find a perfect engine with every appliance convenient for his safety ready at his hand. Under such circumstances it was his duty to make reasonable inspection of the boiler upon which he was to work, and to avoid dangers that might arise from the necessary operations of his fellow workmen.

2. Plaintiff's duties were a part of a general plan, the result of which would be to put the locomotive in working order. His part of the work was to cleanse the

inside of the boiler of dirt and scales. The duty of other workmen was perhaps to strip the outside and remove the jacket and rail so that still another class of laborers could have access to defective staybolts. They were all fellow servants and each took upon himself the risk of the others' negligence, if any occurred. It was no part of the duty of the foreman, when he gave the workmen orders to go to work on this engine, to caution each one to beware of the operations of the other.

3. Plaintiff's evidence shows that removing the rail was a necessary part of the labor, and it was among the risks that he assumed when he went to work upon what his previous experience should have suggested might be a defective engine. *Branham v. Camden Cotton Mill*, 61 S. C. 491 (39 S. E. 708); *Gulf, C. & S. F. Ry. Co. v. Jackson*, 65 Fed. 48 (12 C. C. A. 507); *City of Minneapolis v. Lundin* 58 Fed. 525 (7 C. C. A. 344); *Burke v. Nat'l India Rubber Co.*, 21 R. I. 446 (44 Atl. 307). Had plaintiff made even the slightest inspection he would have discovered the absence of the hand rail and the position of the steam pipe. His helper was able to see the conditions. Witness Kenneda says that he noticed that the rail was gone and the pipe misplaced as soon as he came beside it. It is evident that if plaintiff had paid the slightest attention to conditions about him he would have found that the steam pipe was out of place and the hand rail gone. We are forced to the conclusion that his accident was due to plaintiff's neglect to use reasonable care, or, in any case, to observe conditions which any one ought to have noticed.

Defendant moved for a nonsuit which was refused, and, after such refusal, adduced testimony and asked for a directed verdict. We have not discussed the testimony on behalf of defendant for the reason that we think the court should have granted, on plaintiff's own showing, defendant's motion for nonsuit, and no

evidence introduced by defendant tended to strengthen plaintiff's case. At no stage of the case was plaintiff entitled to a verdict. On the other hand, the court should have directed a verdict for defendant. Holding these views it is needless to discuss, in detail, the errors alleged as to the rulings of the court on the admission of certain testimony or the exceptions taken to the instructions, holding, as we do, that the court should have directed a verdict in any event, and that there is an entire absence of testimony showing actionable negligence on the part of defendant. We have, however, carefully considered the alleged errors, both as to the admission of evidence and as to the instructions, and, notwithstanding the able and ingenious argument of counsel for plaintiff, we are not convinced that there was error in the rulings of the lower court.

The judgment of the circuit court is affirmed.

AFFIRMED.

Argued April 7, decided July 6, 1909.

KENNEDY v. HAWKINS.

[102 Pac. 788.]

NEGLIGENCE — INJURIES TO PERSON OR PROPERTY — ELEMENTS OF LIABILITY.

1. To maintain an action for injury to person or property by reason of negligence, there must be shown to exist some obligation or duty towards plaintiff which defendant has left undischarged or unfulfilled.

NEGLIGENCE—COMPLAINT.

2. A complaint for injuries resulting from negligence should allege what duty was imposed on defendants toward plaintiff, or state facts from which the law would imply a duty, and then charge a breach or negligent performance thereof.

NEGLIGENCE—DANGEROUS WORK—CARE REQUIRED.

3. Where workmen were engaged to repair or underpin the wall of a building, the work being essentially dangerous to person and property of the occupants, the workmen were required to use reasonable care and skill in the performance of the work, although as to such occupants they were not bound to undertake it.

NEGLIGENCE—DANGEROUS WORK—DELAY.

4. Workmen agreeing with the owner to support the wall of a building sustained no contractual relation to occupants thereof, so that delay in beginning the work, if any, was not available to such occupants in a suit for injuries to their property by alleged negligent performance of the work.

NEGLIGENCE—PLEADING—COMPLAINT.

5. A complaint alleging negligence generally, without charging the particular facts showing the act or omission to have been negligent, is sufficient, in the absence of an application for a more specific statement.

NEGLIGENCE—COMPLAINT ISSUES AND PROOF.

6. Where a complaint contains a general averment of negligence, and defendant joins issue without moving for a more specific statement, proof of any negligence within the general scope of the allegation in the complaint is competent.

NEGLIGENCE—COMPLAINT—ISSUES AND PROOF.

7. That defendant joined issue on a complaint averring negligence generally without moving to make the pleading more definite, did not relieve plaintiff from the obligation to prove a particular act of negligence.

NEGLIGENCE—RES IPSA LOQUITUR.

8. Where defendants undertook to underpin the foundation of a building, and while doing so the building fell, such facts alone did not establish negligence, as defendants were not insurers of the successful performance of the work without fault or error of judgment, but were only liable for negligence, bad faith, or dishonesty.

NEGLIGENCE—FINDING—CAUSE OF ACTION.

9. In an action for injuries to the personal property of the occupants of a building by the falling of a wall thereof while defendants were performing a contract with the owner to underpin and support the same, evidence held insufficient to sustain a finding that the falling of the wall was attributable to defendants' negligence.

From Multnomah: THOMAS O'DAY, Judge.

Statement by MR. JUSTICE SLATER.

This action was brought by Della Kennedy against W. J. Hawkins, Alfred J. Bingham, and Joseph McClelland to recover the value of certain household goods and personal property belonging to plaintiff, which were destroyed and damaged by the falling of the north wall of the house where she resided, alleged to have been caused by the joint negligence of defendants.

Plaintiff occupied rooms in a three-story brick building belonging to Clara W. Hawkins, the same being situated on lot 7, block 115, near the corner of First and Columbia streets, in the city of Portland, Oregon. Lot 7 is on the east side of First street, and faces west. In the early part of March, 1907, J. F. Shea, the owner of the adjoining lot on the north, began an excavation on his property preparatory to the erection of a building thereon. The west 25 feet of the north wall of the building, in which plaintiff resided, was about on the

property line, and the foundation thereof extended down three or four feet below the surface of the ground. Shea's excavation was to be of a depth of about 11 feet, making it necessary to underpin and support the wall of the Hawkins building on lot 7. It is alleged, in substance, that W. J. Hawkins was the agent of Clara W. Hawkins, the owner of the building where plaintiff resided; that he had been given due and timely notice of Shea's intention to make an excavation; that the building of which he was the agent, should be protected by taking proper precautions to brace and fix up the foundation thereof; that Hawkins employed his codefendants to brace up the foundation thereof, and keep it from falling; that on or about April 1, 1907, all of them "attempted to put supports and braces under said building, and that the same was negligently and carelessly done and without due and proper precautions, and that the said defendants negligently and carelessly failed to place the proper support, foundation, and braces under the foundation of said building, and that through said negligence and carelessness of the said defendants, the said foundation caved and broke away on the 2nd day of April, 1907, and caused the northwest corner of said building to fall and break away," thereby destroying plaintiff's goods contained therein.

Bingham and McClelland answered jointly, denying the material allegations of the complaint, except they admit that they were employed by Hawkins about April 1st to brace up the foundation of the building, and that the foundation thereof caved in and broke away. Hawkins answered separately, but, as the verdict was in his favor, it will not be necessary to state the effect of his pleading. At the close of plaintiff's case, defendants interposed a motion for a nonsuit, based upon the claim that no negligence had been shown. This being denied, defendants offered testimony in their behalf resulting in a verdict against Bingham and McClelland for a por-

tion of the claim, and they have appealed from the judgment entered thereon.

REVERSED.

For appellant there was a brief over the names of *Mr. William D. Fenton, Mr. Rufus A. Leiter and Mr. Ben C. Dey*, with oral arguments by *Mr. J. E. Fenton and Mr. Dey*.

For respondent there was a brief and an oral argument by *Mr. Frank Schlegel*.

MR. JUSTICE SLATER delivered the opinion of the court.

1. The action is based upon an alleged tort. In order to maintain an action for an injury to person or property by reason of negligence or want of due care, there must be shown to exist some obligation or duty towards the plaintiff which the defendant has left undischarged or unfulfilled. This is the basis on which the cause of action rests.

2. There can be no fault, negligence, or breach of duty where there is no act, service, or contract which a party is bound to perform or fulfill. The complaint should allege what duty was imposed upon defendants towards plaintiff, or state facts from which the law will imply the duty, and then allege a breach or negligent performance of the duty. 14 Pl. & Pr. 331, 332.

3. The substance of the facts stated are, that plaintiff was rightfully an occupant of the building, and that the defendants undertook to repair or underpin the wall thereof. The essential nature of the work being dangerous to the persons and property of the occupants of the building, the law imposes upon those who undertook to perform it the duty of using reasonable skill and care in the performance of the task, although, as to plaintiff, they were not bound to undertake it.

4. The right of action comes from a duty imposed by law, and not from a duty arising out of contract, because no contractual relation existed between plaintiff and defendants. Therefore delay in beginning the work,

if any, can be of no avail to plaintiff (1 Cooley, Torts, 240), for that would amount only to a breach or negligent performance of duty arising out of contractual relations existing between either the owner of the building and Hawkins, her agent, or between her and the defendants, Bingham and McClelland. The effect of the averment that Hawkins, as agent of the owner, employed his codefendants to perform certain work upon the building, is to deprive them of the character of trespassers, and to authorize them to enter upon the premises for the business they undertook.

5. The nature of the action being that of a pure tort, the right to recover must be confined to a negligent act or omission of the defendants done in the course of the performance of the task which they undertook, and which was the proximate cause of the building falling. The complaint does not point out specifically the particular act of negligence or omission of duty relied upon, but avers generally that defendants "attempted to put supports and braces under said building, and that the same was negligently and carelessly done, and without due and proper precautions, and that said defendants negligently and carelessly failed to place the proper support, foundation, and braces under the foundation." It is always necessary in pleading negligence to allege that some act was negligently done, or that something that ought to have been done was omitted, but it is not necessary to set forth the particular facts that show the act or omission to have been negligent. *Cederson v. Oregon Navigation Co.*, 38 Or. 343 (62 Pac. 637: 63 Pac. 763).

6. But, when a complaint contains a general averment of negligence, and the defendant joins issue without moving to make the pleading more definite, proof of any negligence within the general scope of the allegation is competent. *Jones v. City of Portland*, 35 Or. 512 (58 Pac. 657).

7. This, however, does not relieve the plaintiff from proving a particular act of negligence upon which she

bases her right to recover, and in this respect we think she has failed.

8. Defendants admit in the pleadings that they undertook to underpin the foundation, and that while in the performance thereof the building fell, but this of itself, taken in connection with the surrounding circumstances, does not establish negligence; for no man, whether skilled or unskilled, undertakes that the task he assumes shall be performed successfully and without fault or error. He undertakes for good faith and integrity, but not for infallibility, and he is liable to his employer for negligence, bad faith, or dishonesty, but not for losses consequent upon mere errors of judgment. 2 Cooley, Torts, 1386.

9. With this preliminary statement of the legal principles governing the consideration of the case, we proceed to the facts disclosed by the plaintiff's testimony. Shea testifies that about March 4th he began tearing down the old buildings on his lot, which work consumed about ten days, and then he began the excavation; that 20 or 25 days before the accident he had a conversation with Hawkins about the necessity of underpinning the foundation of the latter's building, and, at the latter's request, offered to secure the services of his brick mason to do the work; that a few days thereafter he told Hawkins that his mason could not do the work, and thereafter Hawkins employed Bingham and McClelland; that Bingham came to the premises, examined the situation, and between them they agreed with Shea that the latter had left sufficient soil next the building to reasonably insure its safety. At that time Shea had excavated to the full depth of his basement at a distance from the building standing on lot 7, but had left next thereto a bank of earth, estimated by him to be three feet across at the foot wall, and sloping off to the north to a width of ten or fifteen feet. Shea is very indefinite and uncertain as to the precise time this conversation with Bingham

took place with relation to the beginning of defendant's work, but the time is stated definitely by Hawkins in his disposition offered by the plaintiff. He testifies that on Thursday, March 28th, Shea informed him that his mason could not do the work, and that he immediately sought the services of Bingham and McClelland, finding the latter engaged at the Wells-Fargo building, then in course of construction. The former was out of town, but he saw him the next morning, and perfected an agreement with him to underpin the foundation. The defendants were to get their material on the ground the next day and begin the task Monday, April 1st, which they did. It is shown that they are experienced men in that class of work. On the first day a pit was dug under the wall at the east corner of the building to the depth of Shea's intended excavation, and a brick pier was built therein, and was completed on Tuesday morning a short time before the accident occurred, which was about 11 o'clock of that morning. A second pit of the same character had been dug at the center or middle of the wall. A mason was engaged in constructing a brick pier and two or three courses of brick had been laid. One of the defendant's employees had started to excavate a third pit at the northwest corner of the building, when the bank of earth supporting the wall gave way, and the wall from the northwest corner back to the completed brick pier fell. The soil, to a depth of about four feet, consisted of clay, under which was a stratum of sand.

Plaintiff apparently attempts to place the negligence of the defendants upon the claim that these pits were unnecessarily large, and that but one should have been dug at a time, but no one experienced in that work undertook so to testify. We believe two witnesses did testify that too much dirt had been removed from the wall, but it was not specifically charged as the act of the defendants. Shea did say that each of these pits was five or six feet across, but the photographs of the

scene, taken after the wall fell, and offered in evidence by the plaintiff, disclose very clearly that the pier built at the corner occupies the full width of the excavation made for it under the wall, and, computing from the well-known dimensions of ordinary brick, it cannot be over $29\frac{1}{2}$ inches across. To underpin a brick wall, it is, of course, necessary to first make an excavation of some sort under the wall. The pier at the east corner having been completed before the accident, no negligence could be attributed to defendants on account of that excavation. The second pit at the middle of the wall, and about 12 feet distant from the first was of the same character. It is not shown that it was of unusual or unnecessary size, or that it was not proper or customary so to locate or dig such a pit under a wall, assumed by plaintiff to have been in a reasonably safe condition before the work began. In other words, to hold defendants liable under such circumstances, it must be held that it was negligence on their part to attempt at all to do the work in the manner employed by them. If negligence is predicable at all in that regard, it must be upon the basis that the wall was in a dangerous condition before they entered upon the performance of the work, and that they knew, or ought to have known, of such dangerous condition. This, however, plaintiff does not seek to charge. Plaintiff's case, however, discloses that a large amount of earth immediately adjacent to this wall which was necessary for its proper and reasonable support must have been removed by Shea's employees while defendants were engaged in procuring material and putting in the first pier. Shea testified that, when Bingham and he had agreed that there was sufficient earth left, there was a bank from two to three feet in width at the top sloping off from ten to fifteen feet at the bottom, but the photographs in evidence, above referred to, disclose no such quantity of soil. In fact, it is difficult to discover that there was any appreciable

amount left. Hawkin's deposition also discloses that, when he examined the premises after the accident, he discovered there was not nearly the amount of embankment next the wall as there was when he was there on Thursday, March 28th, preceding the accident, and he says that a large amount must have been removed by Shea. While the latter qualifiedly denies this in his rebuttal testimony, yet he admits in his testimony in chief that he afterwards "shaped up" the bank some, and that Bingham told him he would not start in until he (Shea) got down deeper with the excavation, so that he (Bingham) would not have to handle the dirt twice. This, we think, is sufficient to remove the apparent conflict in the testimony, so that the facts are practically undisputed and disclose that the falling of the wall was not attributable to the alleged negligent acts of Bingham and McClelland, and therefore the court should have sustained their motion for a nonsuit.

The judgment is reversed, and the cause remanded for a new trial.

REVERSED.

Argued March 24, decided June 1, rehearing denied July 18, 1900.

SEABROOK v. COOS BAY ICE CO.

[102 Pac. 175; 102 Pic. 795.]

EJECTMENT—TRIAL—NONSUIT.

1. A motion for nonsuit in ejectment, on the ground that the evidence shows title only to tide lands, while the complaint describes land only below low tide, is properly denied, where the answer admits the premises are above low tide.

APPEAL AND ERROR—REVIEW—SUBSEQUENT APPEAL.

2. Where it was held on a former appeal that the defense of adverse possession was not sustained by the evidence, and the evidence on the second trial was no stronger in defendant's favor, that defense will not be further considered on the subsequent appeal.

BOUNDARIES—ESTABLISHMENT—EVIDENCE.

3. The rule that in government surveys the first lines and corners are only temporary, and, if the metes and bounds do not close, correction back is made by dividing the error and moving the lines and corners before they are made permanent, does not apply in retracting permanent surveys to the extent of moving established boundaries so as to include land not within the government survey, and in ejectment evidence of such rule and the map of the premises involved, made on such theory, are not admissible.

EJECTMENT—IDENTITY OF LAND—EVIDENCE.

4. Evidence held insufficient to identify an alleged strip of land between the true boundaries of two tracts according to government surveys.

BOUNDARIES—LOCATION—EVIDENCE.

5. The location of the beginning point of a survey would not be regarded as established by the testimony of a witness, who was present when the survey was made, as to his recollection of its location, after the lapse of thirty-four years.

BOUNDARIES—BEGINNING CORNER—LOCATION—EVIDENCE.

6. Evidence held to show that the northeast corner of a certain lot had not been properly located in the Whereat's survey, and could not, therefore, be taken as the starting point from which to locate an angle to which such survey was tied.

From Coos: JAMES W. HAMILTON, Judge.

Statement by MR. JUSTICE EAKIN.

This is the second appeal of this action. For former appeal, see 49 Or. 237 (89 Pac. 417).

This is an action in ejectment to recover possession of the following described property:

"Beginning at the intersection of the south boundary line of block 66 of Nasburg's addition to the city of Marshfield, projected easterly with the easterly line of Front street, in said Nasburg's addition to the city of Marshfield, projected southeasterly; thence east to the harbor line of Coos Bay, established by the United States War Department, the same being east of the low-water mark in said Coos Bay; thence along said harbor line 58 feet; thence west to a point south of the place of beginning; thence north to the place of beginning, situated in Coos County, Oregon, and being tide lands."

Plaintiff's grantors, Lapp and Hall, acquired title thereto from the State of Oregon by a deed describing the same as follows:

"All of the tide land, lying in front of and abutting on lot 4, of Sec. 26, T. 25 S., R. 13 W., except that tract heretofore, on the 25th day of November 1874, sold to Charles E. Fox, and excepting also that tract sold to G. Webster, April 10, 1893." That the Fox tract referred to in said description is bounded as follows: "Beginning at the meander post or line between section 26 and 27, T. 25 S., R 13 W., Will. Mer., and running along the meander line south 58 degrees E., 22.30 chs.; south 51

degrees E., 10 chs.; S. 9 degrees E., 1.74 chs.; thence E. 4.50 chs. to low-water line; thence along low-water line N. 9 degrees W., 1.74 chs.; N. 51 degrees W., 10 chs.; N. 45 degrees W., 20 chs; thence W. 8.50 chs. to place of beginning." And also the Webster tract referred to is bounded as follows: "Beginning 2.21 chs. northward from a post at angle in meander line of Coos Bay, said post being 7.50 chs. N., 17 degrees E. from the N. E. corner of lot 2 in Sec. 26, T. 25 S., R. 13 W., Will. Mer. and running northward along the meander line 16.75 chs.; thence E. 4.50 chs. to low-water mark; thence southward along low-water line 16.75 chs.; thence west 4.50 chs. to place of beginning."

Plaintiff contends that there is a tract of land about 75.8 feet wide, lying between the Fox and Webster tracts, of which the ground attempted to be described in the complaint is a part and in the possession of defendant, and it is contended by defendant that the premises occupied by it are a part of the Fox tract. The principal witnesses are the surveyors who testify as to the boundaries of the Fox and Webster tracts. At the close of plaintiff's testimony, defendant moved for a nonsuit, which was denied, and at the close of the trial the court directed a verdict for plaintiff that he is the owner and entitled to possession of the property, and judgment was rendered thereon, awarding the same to him, from which defendant appeals.

REVERSED.

For appellant there was a brief over the names of *Mr. Edward L. C. Farrin*, *Mr. James Upton* and *Mr. Austin S. Hammond*, with an oral argument by *Mr. Hammond*.

For respondent there was a brief over the names of *Messrs. Coke & Seabrook*, with an oral argument by *Mr. Ephraim B. Seabrook*.

MR. JUSTICE EAKIN delivered the opinion of the court.

1. There are but two principal issues involved here:
(1) Is there a tract of land between the Fox and Webster

tracts that may be included in the State deed to plaintiff's grantor? (2) As to the true location of the south line of the Fox tract. Defendant also pleads title by adverse possession. The grounds of the motion for nonsuit, relied upon, are: (1) That neither the pleading nor proof identifies the property described in the complaint with the property described in the deed to the plaintiff from his grantor, Lapp; (2) that plaintiff has only proved title to the tide land, namely, land above low tide, while it contends that the premises sought to be recovered are below low tide, therefore incorporeal, and not recoverable in ejectment.

Plaintiff's property is described in the complaint from the southeast corner of block 66 of Nasburg's addition to the city of Marshfield, and plaintiff offered in evidence a copy of the plat of that addition, evidently for the purpose of identifying the property described in the complaint. This plat contains no explanation of its contents, statement of survey, or reference to any government corner by which it can be located. There is a line thereon marked as the west line of section 26, township 25 S., range 13 W., but only a fraction of it. We might assume that a certain small red circle indicates the intersection of that line with the meander line of the bay, and we might assume that the south line of block 66 extended east is the south line of the Fox tract; but it would only be an assumption. There is nothing on the plat which would justify it, and the complaint in no way connects the property described with the Fox tract; but this defect in description is aided by the answer in which the defendant's property is described, evidently by reference to the same plat, and alleges that the lands described in the complaint are a portion of the lands described in the answer, and both descriptions are aided by the Whereat plat, and, in view of the fact that this is the second trial upon these pleadings, we will assume that the point of beginning of the description of the property

claimed by plaintiff, is intended by him to describe a point on the south line of the Fox tract, and that the north line of Delta street by which defendant describes its property is several feet south of the south line of block 66, and is also intended to describe a point on the south line of the Fox tract. The trial proceeded upon the theory that the south line of the Fox tract is the true line between the properties of plaintiff and defendant.

The answer concedes that the premises sought to be recovered are tide lands; defendant claiming title thereto by conveyance from the State, thus admitting that the premises in controversy are above low tide. The evidence therefore upon that question was immaterial, and the motion for nonsuit was properly denied.

2. As to the plea of adverse possession, on the former appeal we held that the proof was not sufficient to establish adverse possession, and the proof upon the second trial is no stronger in defendant's favor than at the first trial, and that plea need not be further considered.

3. A map, identified by witness Polley, was offered in evidence, but was excluded by the court, and Polley was not permitted to testify as to whether or not he found a tract of tide land between the Fox and Webster grants, and this is assigned as error. But Polley's survey of the Fox tract is based on the fact that the metes and bounds thereof, as set out in the deed from the State, do not close; the east line thereof being too great, and the distance in the last call of the survey being insufficient to reach the place of beginning. Therefore he swings the whole survey south and west to correct this error, by dividing the errors in the manner, as he says, the government permits correction back in sectionizing lands of the government; but in the public survey the first lines and corners are only temporary, and the result of the correction back becomes the permanent lines and corners; but such a rule cannot apply in retracing permanent surveys

to the extent of moving out established boundaries, so as to include territory not within the original survey, and Polley's map was drawn on the theory of this correction, and both it and his testimony based thereon were properly excluded.

4. The evidence offered to establish the angle in the government meander line, to which the survey of the Webster tract is anchored, does not appear to be complete. The government meander line through section 26, as shown by the field notes, is 80.80 chains, viz: "From the meander post between sections 26 and 27; thence in section 26, S. 58 degrees E. 22.30 chs.; S. 41 degrees E. 15.00 chs.; S. 6¼ degrees E. 15.00 chs.; S. 17 degrees W. 15.00 chs.; S. 10 degrees W. 13.50 chs. to meander post between sections 26 and 35." The northwest corner of the Webster tract is 47.46 chains along the meander line northerly from the meander post between sections 26 and 35, and the west line of the Fox tract extends southeasterly from the meander post between sections 26 and 27, along the line of the survey of that tract is 34.04 chains, although diverging from the government meander line, making the whole line, without allowing for any vacant tract, 81.50 chains, which exceeds the length of the meander line .70 chains. Making allowance for the increased length of the west line of the Fox tract on account of its divergence from the government line, which will not exceed probably 15 or 20 feet, still it would overlap the Webster tract. Again, the witness Whereat locates the angle post to which the Webster tract is anchored from the northeast corner of lot 2 of section 26, alone, and has ignored the measurements and angles of the meander line in which this angle occurs. We stated in the former opinion "that the reference in the deed to the northeast corner of lot 2 is only as a witness corner to identify and aid in finding the angle mentioned, and not to control it." It was not a government witness corner to that angle, but a reference by the

county surveyor to identify the government angle to which he anchored the Webster survey. The north line of lot 2 was an unsurveyed line and no part of the government survey. Its point of intersection with the west line of the section was unidentified, as well as its point of intersection with the meander line. Therefore, if 7.50 chains north 17 degrees E. from the point established by the witness as the northeast corner of lot 2, locates that angle more or less than 48.50 chains, according to the course of the meander line from the meander post between sections 26 and 35, then it cannot control. Measurements from the northwest corner of the section must also be consulted. Polley's testimony as to his location of that angle is indefinite. He refers to points and lines by pointing at the map, and pointing means nothing to one who is not present; but Mr. Seabrook's objection to Polley's map, states that there is a difference of 79 links (52.14 feet) between his point of location of that angle and that of Whereat, which would make a corresponding difference in the location of the northwest corner of the Webster tract, as there does not seem to be any other discrepancy between their surveys on that line. And taking this difference, as the result of Polley's survey, namely, placing the tie angle .79 chains northerly from Whereat's location of it, approximates very closely the point that appeared on the former trial as an angle in the government meander line, as ascertained by Whereat, which was shown both by his testimony and his map. It is stated in the former opinion (49 Or. 243 [89 Pac. 418]): "Whereat's survey or tracing is erroneous in adopting as a tie corner the point 63.9 feet southward on the meander line from the angle mentioned.

There is another view that convinces us that Whereat's starting point may be erroneous. By his map he locates the northwest corner of the Webster tract north 41 degrees W. on the government meander line 261.36 feet (3.96 chains) from the second angle of the government

meander line southeast from the north corner of the section, and this is correct according to the deed. The distance from that point on the government meander line to the north corner of the section, according to field notes, is 33.34 chains. The west line of the Fox tract is 34.04 chains, being 70 links (46.2 feet) overlap.

We have made these figures from the map and data found in the record, but they cannot control as against an actual survey on the ground. They are the data from which the survey must be made. To establish that there is any vacant land between the Webster and Fox tracts, it must be demonstrated that the actual measurement of the government meander line is more than 80.80 chains. This element has not been taken into account by Whereat, at least he has not given us the facts in relation thereto. Plaintiff is not entitled to recover until he has established his title, and the evidence does not justify a verdict in his favor for the whole property sued for.

Judgment will be reversed and the cause remanded.

REVERSED.

Decided July 18, 1909.

ON PETITION FOR REHEARING.

[102 Pac. 796.]

MR. JUSTICE EAKIN delivered the opinion of the court.

But two points are urged in this motion: (1) That we should accept the location of the beginning point of the Webster survey upon the testimony of a witness who was present when the Webster claim was surveyed as to his recollection of its location; (2) that the court should determine the angle in the government meander line to which the Webster survey is tied, as being 7.50 chains north 17 degrees east from the northeast corner of lot 2 in section 26.

5. As to the first point, we cannot accept the recollection and testimony of a witness as to a surveyor's location

of a corner after a lapse of 34 years. That would hardly be a safe precedent.

6. As to the second point, we have nothing before us showing the manner or place of the location of the northeast corner of lot 2 as it was originally located by the county surveyor, who surveyed the Webster tract. He seems to have established a corner, and referred to that as a witness corner to identify an angle in the meander line. Neither does it appear that the surveyors in the present case found or acted upon a monument established by the earlier survey; nor is there anything to indicate that a permanent monument had been established, or that there is any county record of the original survey establishing the northeast corner of lot 2. In other words, it does not appear that the northeast corner of lot 2, as now recognized by Whereat, is the same point mentioned in the Webster survey. The witness Whereat locates the northwest corner of lot 2 as 1,316.5 feet (19.986 chains) north 0 degrees 31 minutes west from the southwest corner of section 26. This, of course, must approximately correspond with the length of a line perpendicular from the south line of section 26 at its point of intersection with the meander line north to the north line of lot 2, from which, together with the course and distances of the meander line northerly from the section line, we can compute exactly the point where the north line of lot 2 intersects the meander line. We find that it will intersect the meander line at a point 6.94 chains north 17 degrees east from the first angle in the meander line north from the section line. The whole distance of that course to the second angle is 15 chains. This will make the distance from the northeast corner of lot 2 to the angle in the meander line, to which the Webster survey is tied, 8.06 chains, or about 56 links (36.96 feet), farther east than as located by Whereat. If we take Polley's measurement of the west line of lot 2, 1,305.71 feet (19.783 chains), it will make the distance from the

northeast corner of lot 2 to that angle 8.23 chains, and this indicates that the first survey of the Webster tract located the northeast corner of lot 2 at a different point than it is now located by Whereat.

These figures add additional strength to the features mentioned in the opinion, indicating that the northeast corner of lot 2 has not been properly located in the Whereat survey, and should not be taken as the starting point from which to locate the angle referred to. The writer does not make these figures to control any subsequent survey. They are based on the figures in the record, while a correct survey may produce different results. But with the points mentioned in the opinion they indicate that Whereat's location of that corner should not be accepted as final. We adhere to our former opinion.

Motion is denied.

REVERSED: REHEARING DENIED.

Argued May 6, decided July 13, 1909.

RYNEARSON v. UNION COUNTY.

[102 Pac. 785.]

TIME—COMPUTATION—DAYS.

1. Except in special cases when otherwise provided, a prescribed period of days within which an act must be done is to be computed by excluding the first day and including the last.

HIGHWAYS—PROCEEDINGS TO VACATE—NOTICES.

2. Laws 1908, p. 264, § 8, provide that, when a petition shall be presented to the county court for vacating a county road, it shall be accompanied by satisfactory proof that notice has been given by advertisement, posted thirty days previous to the presentation of the petition to the court at its next session. Notices were posted September 3d, reciting that application to vacate part of a county road would be made to the county court at its next session on October 3d. *Held* that, as the thirty days limited for the posting of the notices did not expire until the last hour of October 3d, they were posted only twenty-nine days prior to the next session of the county court, and the court did not acquire jurisdiction.

HIGHWAYS—VACATION—PROCEEDINGS—CERTIORARI.

3. When attention is called to a lack of jurisdiction, the duty devolves upon the court to set aside the proceedings and purge the record of informalities, though the defect has not been challenged in a formal way, and hence upon writ of review in the circuit court to review proceedings in the county court to vacate a highway, where it appeared that the county court had not

acquired jurisdiction, its order vacating the road was properly set aside, though its power to hear and determine the matter had not been formally challenged.

JURISDICTION, WANT OF—DUTY OF COURT.

4. At any stage of the proceeding, when want of jurisdiction is manifest, it is the duty of the court and on its own motion to refuse to proceed further

From Union: HENRY J. BEAN, Judge.

This is an appeal by Union County from a proceeding wherein judgment was rendered, sustaining a writ of review and setting aside an order of the county court vacating a part of a county road, from which judgment defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *Mr. Francis S. Ivanhoe*, District Attorney, and *Mr. Turner Oliver*.

For respondent there was a brief with an oral argument by *Mr. Eugene Ashwell*.

Opinion by MR. CHIEF JUSTICE MOORE.

1. This is an appeal by the defendant from a judgment that sustained a writ of review and set aside an order of the county court of Union County vacating a part of a county road. The order referred to was annulled on the ground that notices of the application were not posted for the time required therefor, though such alleged defect was not assigned as error in the petition for a writ of review. The return of the writ sets forth a copy of the notices informing all persons that application to vacate a part of such highway would be made to such county court at its session then next ensuing; i. e. Wednesday, October 3, 1906. The return also shows that proof of publication of such notices was made by the affidavit of Wm. Miller, who, designating the places where the notices were severally posted, stated that he put them up September 3, 1906, being 30 days previous to the presenting of the petition. The statute regulating the mode of securing jurisdiction contains the following provision:

"When any petition shall be presented for the action of the county court for * * vacating * * any county road, it shall be accompanied by satisfactory proof that notice has been given by advertisement, posted * * thirty days previous to the presentation of said petition to the county court. * * at their next session for * * vacating * * such road. Laws 1903, p. 264, § 8.

The time within which an act is required to be done shall be computed by excluding the first day and including the last. Section 531 B. & C. Comp. Except in special cases when otherwise provided, the general mode thus prescribed for calculating allotted periods is controlling. *Grant v. Paddock*, 30 Or. 312 (47 Pac. 712).

2. In application of this rule by excluding September 3, 1906, the day when the notices were posted, it will be ascertained that the 30 days limited for the advertising of the notices did not expire until the last hour of October 3, 1906, the first day of the term of the county court then next ensuing. *Boothe v. Scriber*, 48 Or. 561 (87 Pac. 887: 90 Pac. 1002). The notices were therefore put up only 29 days prior to the next session of the county court of Union County, when the statute hereinbefore quoted expressly commands that the notices shall be posted 30 days "previous" to the presentation of the petition. By failing strictly to comply with such requirement, jurisdiction to close the county road was not secured by the county court; and its order vacating a part of the public highway is void.

3. The remaining question to be considered is whether an error was committed in setting aside the order of the county court, when its power to hear and determine the matter was not formally challenged. A writ of review is allowed upon the petition of the plaintiff describing with convenient certainty the decision or determination sought to be reviewed, and setting forth the errors alleged to have been committed therein. Section 596, B. & C. Comp. In *Curran v. State*, 53 Or. 154 (99 Pac. 420), it is said: "When the writ of review has been issued, the petition

which initiated the proceedings has performed the office for which it was interposed, and thereafter ceases to be operative for any purpose, except, possibly, that reference may be had to it to ascertain the errors assigned." When at the trial of a cause attention is called to a lack of jurisdiction, the duty devolves upon the court to set aside the proceedings and to purge the record of informalities, though the defect has not been challenged in a formal way. *Woodruff v. Douglas County*, 17 Or. 314 (21 Pac. 49); *Cameron v. Wasco County*, 27 Or. 318 (41 Pac. 160); *Huffman v. Huffman*, 47 Or. 610 (86 Pac. 593; 113 Am. St. Rep. 943).

4. When want of jurisdiction appears, it is the duty of the court at any stage of the proceeding on its own motion to refuse to proceed further. *Evans v. Christian*, 4 Or. 375; *State ex rel. v. McKinnon*, 8 Or. 487.

Believing that no error was committed in sustaining the writ of review and in setting aside the action of the county court in the particular specified, the judgment is affirmed.

AFFIRMED.

Argued May 5, decided July 13, 1909.

LAUGHLIN v. CONNORS.

[102 Pac. 798.]

MECHANICS' LIENS—EVIDENCE TO ESTABLISH—SUFFICIENCY.

1. One seeking to establish a lien for materials and labor furnished to a contractor, must make a definite showing as to value in order to prevail.

MECHANICS' LIENS—EVIDENCE—SUFFICIENCY.

2. Evidence examined, and held insufficient to establish a lien for any definite amount for labor and materials furnished a contractor.

From Baker: WILLIAM SMITH, Judge.

Statement by MR. JUSTICE EAKIN.

This is a suit by J. E. Laughlin to foreclose a mechanic's lien upon the Knights of Pythias building, erected in the year 1907, in Baker City, Oregon. L. Connors was the contractor for the stonework of the building. Plaintiff furnished a great deal of labor for Connors in the erec-

tion thereof, and also delivered the sand, to be paid for by the yard, the rock from the car, to be paid by the perch, and gravel, to be paid for by the load, at prices agreed upon, amounting, as plaintiff alleges, to the sum of \$1,287.38, upon which he admits payments to the amount of \$794.05, claiming a balance due of \$493.33, for which he filed a mechanic's lien against the building.

Defendant Gauntlet Lodge No. 8, in answer to the complaint makes certain denials, and alleges affirmatively that the work and materials furnished by plaintiff did not exceed in value \$550, and that the amount thereof has been paid by the said Connors. Connors did not appear in the suit. Before the work was completed, he quit the contract and left the country, without settling with plaintiff or making any provision for his payment, if anything was due him. Plaintiff commenced work about March 11, 1907, and ceased work about November 22, 1907. He was unable to read or write, or to make any entries or memoranda of his work, except by tallies, which he made in a small tablet. At times, at long intervals, he had other persons make memoranda of items of his work in a small account book, as he dictated it, but only for a portion of his work. He has kept no record of the payments made to him. Connors had contracts also upon other buildings in process of construction at the same time with the Knights of Pythias building, and plaintiff did work of the same character and at the same time for Connors upon the other buildings. At the time of the trial the tablet upon which plaintiff had kept his tallies had been accidentally destroyed, but he testified he had it at the time he prepared and filed his lien, and at the time the memoranda were made in his account book. The trial court found it was impossible to determine from the record in what, if any, sums plaintiff would be entitled to a lien upon defendant's building, and gave decree for defendant. Plaintiff appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Charles A. Johns*.

For respondent there was a brief over the names of *Messrs. Lomax & Anderson*, and *Messrs. Drowley & Levens*, with an oral argument by *Mr. Gustav Anderson*.

MR. JUSTICE EAKIN delivered the opinion of the court.

1. We agree with the trial court that it cannot be definitely ascertained from the testimony and record what amount is due from Connors to plaintiff for work done on the Knights of Pythias building, or that any amount is due or lienable. Plaintiff has no contract relation with the defendant lodge or personal claim against it. On the contrary, the laborer has only a lien on defendant's property under certain conditions, namely, that the labor was furnished in construction of defendant's building at the original contractor's request; that the contractor has failed to pay him, and he has filed a notice of lien thereon in the county clerk's office, as provided by statute. The defendant has no means of keeping the accounts between the contractor and laborer, but is largely dependent on their statement as to the amount of their claim, when the contractor fails to fulfill his contract. Therefore the items of plaintiff's claim must be brought clearly within the statute by definite proof, and it cannot be left to conjecture. Making due allowance for plaintiff's inability to keep his accounts, or to make memoranda thereof, and his efforts to keep account of his work by tallies, we think the conditions of this account, at least as it affects the defendant lodge, inextricable. He has charged in this lien for 309 yards of sand, while the testimony indicates that about 176 yards were used. He has charged for hauling 924 perch of rock from the car, while the testimony indicates that 769 perch were used, which would reduce his claim \$185.

The evidence as to labor with his team at the building is very indefinite and unsatisfactory. No dates are

given or reference to the character of the work, and plaintiff confessed his inability to testify to these particulars, but refers to the statements in the book as the basis of his information. Exhibit C, attached to Connors' deposition, showing work and material furnish the Knights of Pythias building, to the amount of \$159.50, was undoubtedly a statement furnished by plaintiff to Connors against the Kelly building, and was subsequently changed by some one by inserting the letter "P" after "K" in two places to make it read: "K. P. Bldg." However, no item therein seems to correspond with any item in the statement annexed to the lien. The entries in Connors' book do not have the appearance of having been made at the date of the transactions. They are in pencil and all appear to have been made at one time, by the same hand and pencil, while entries therein on prior pages, covering items occurring during the same period of time, show different handwritings and pencils.

On the question of payments there is great uncertainty. Plaintiff admits payments to June 17, 1907, \$394.05, as shown by a statement rendered him by Connors of that date. (Plaintiff's Exhibit D.) Connors' account book shows additional payments to plaintiff in the sum of \$1,586.10. Plaintiff has memoranda entries in his account book of payments received by him subsequent to August 28th, which includes \$275 not included in either of the above, making a total of \$2,255.15, and these payments are practically undisputed, except as some of these items may be duplicated or credited to the wrong account. Of this, items amounting to \$610.10 are mentioned in Connors' book as paid on other claims than those against the Knights of Pythias building. And possibly some items are duplicated. Plaintiff's memoranda credits Connors' with an item of \$100 cash after August 28th, which he says is another payment than the check for that amount of date November 22, 1907. But possibly he is mistaken, and that it is the same item, as the entries

of all these items have the appearance of having been made at one time. The Connors' statement (plaintiff's Exhibit D) of June 17, 1907, charges plaintiff with a payment of \$225 cash, which plaintiff admits in his lien and complaint was paid on the Knights of Pythias building account, and that it was made in May, and in his testimony says it was paid on the Kelly building, while Connors' book charges plaintiff with \$225, of date July 19, as paid upon the Kelly building. This evidence seems to establish two payments of that amount. Assuming that these two items are duplicates, which we have no right to do in favor of the lien, and that the item was actually paid upon the Kelly building, it still leaves credits upon the Knights of Pythias building amounting to \$1,320. All payments made upon account of work at the quarry for labor, board, and feed, including the carload of rock, are proper credits on account of the Knights of Pythias building, as the work was for that building, and we have included them in these figures. We have not made these figures for the purpose of striking a balance between plaintiff and Connors, but to show that the evidence leaves the matter in such uncertainty that no lien can be declared. The entries in the books of both plaintiff and defendant Connors are not properly identified, nor are they satisfactory evidence of the transactions referred to, and plaintiff's evidence is very largely dependent upon the statements in the books which he did not make and cannot read, and his examination shows that he knew little or nothing about the matters of which he was testifying.

The decree of the lower court is affirmed.

AFFIRMED.

Argued April 8, decided July 18, 1909.

ABEL v. COOS BAY, ROSEBURG & E. R. & N. CO.

[102 Pac. 796.]

MASTER AND SERVANT—INJURY TO SERVANT—QUESTION FOR JURY.

1. In an action for injuries to a brakeman owing to the train on which he was riding having passed through an open switch and collided with a car, the

question whether he was negligent in riding on a step of the tender *held one for the jury.*

MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE—QUESTION FOR JURY.

2. Where, in an action for injuries to a brakeman on a logging train owing to the train having passed on an open switch and collided with a car, the evidence showed that it was customary for the switch to be left open after certain switching operations, which had recently been completed when the accident occurred, and that plaintiff had reason to believe that it was open, the condition of the switch did not constitute negligence. The question whether it was the proximate cause of the injury, *held one for the jury.*

MASTER AND SERVANT—INJURY TO SERVANT—QUESTION FOR JURY.

3. In an action for injuries to a brakeman owing to the train on which he was riding having passed upon an open switch and collided with a car, the question whether the defendant was negligent in leaving the car on the track, *held for the jury.*

MASTER AND SERVANT—INJURIES TO SERVANT—INSTRUCTIONS.

4. Plaintiff was employed as a brakeman on a logging train by railroad company which operated logging trains on a certain branch of the road, and on a spur running from the branch, and plaintiff knew that it was customary to leave the switch from the spur to the branch open on to the spur after certain switching operations. Plaintiff was injured owing to the train on which he was riding, passing upon the open switch and colliding with a car at a time when he had reason to believe that the switch was open owing to the operations referred to having recently been completed, and the court charged in an action for the injury that, if the branch was in general use for passengers and freight service, it would constitute a main line, and was subject to the customs and rules of railroads as to main lines and spurs. *Held*, that the instruction was erroneous.

From Coos: JAMES W. HAMILTON, Judge.

Statement by MR. JUSTICE EAKIN.

This is an action by Albert Abel against the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, for an alleged personal injury. The defendant company is the owner of a railroad from Marshfield to Myrtle Point, in Coos County, Oregon, about 26 miles. Some distance south of Marshfield, on the main line of the road, is a branch or spur from Beaver Hill Junction to Beaver Hill, about $1\frac{1}{2}$ miles, and from a point on this branch, about three-eighths of a mile from Beaver Hill Junction, most of which distance the track is on a trestle, is a branch from the Klondyke Spur Junction to Klondyke logging camp, about a mile. At the time of the injury complained of the road was operated by a receiver appointed by the United States district court

in the case of the *Farmers' Loan & Trust Co. v. Coos Bay, Roseburg & Eastern Railroad & Navigation Co.* (this defendant) *et al.* Thereafter, and prior to the commencement of this action, this suit was dismissed, and the receiver discharged, without prejudice to the rights of any person who theretofore by leave of court had been authorized to sue the receiver to continue such suit against the defendant railroad company.

The Beaver Hill branch was used for transporting coal and logs from Beaver Hill, and the Klondyke Spur for transporting logs from Klondyke logging camp, to the main line and thence to Marshfield. Upon the day of the accident, train No. 1, being a logging train, upon which Boone was conductor and plaintiff and Thomas, brakemen, brought a train load of logs to Klondyke Spur switch from Klondyke logging camp, and No. 2—also a logging train—upon which Cardell was conductor, brought from Beaver Hill a train load of logs to the Klondyke Spur switch, and the two trains were there consolidated, train No. 2 taking the cars of No. 1 on the Klondyke switch, and the engine of train No. 1 being in front as a helper. The last car of logs in train No. 1, on account of a broken reach, was left on the Klondyke Spur, 200 or 300 feet out from the switch, and the train pulled out, leaving the switch open, as was usual in such cases. The engine of train No. 1 and its crew helped train No. 2 over the divide toward Marshfield, on the main line, and at the summit took the caboose, Conductor Boone, and brakemen, Thomas and Abel, and some track layers, and returned toward Beaver Hill, the engine running backward, the caboose behind, and the two brakemen riding on the tender. As they left Beaver Hill Junction, on the Beaver Hill branch, plaintiff got on an iron step on the right side of the tender at the front, which is placed there for the convenience of the brakemen. He says he took that position for the purpose of throwing the Klondyke switch. This was after 7 o'clock

P. M. It was dark, rainy, and windy. The engine was running quite rapidly, and he did not see the switch or know when he reached it until he heard the click of the wheels crossing it, when Thomas noticed they were taking the Klondyke switch, and he told plaintiff to jump. Plaintiff's lantern went out, and, not knowing what was wrong, he started to climb upon the end of the caboose, when it struck the car of logs, and the end of a log caught his leg and broke it. Plaintiff alleges that defendant was negligent in leaving a loaded car on the Klondyke spur, and in leaving the switch open; in failing to advise him of these conditions, and also alleges that he did not know the car was left on the spur or that the switch was open.

Defendant denies liability, and alleges that the Klondyke spur was frequently used upon which to leave cars, and that it was customary for the last train out of that spur in the evening to leave the switch open; that these acts were not negligent, and that the accident was the result of plaintiff's negligence in riding on the step of the tender from the Beaver Hill Junction, it being a dangerous place. Verdict was rendered for plaintiff, and defendant appeals.

REVERSED.

For appellant there was a brief over the names of *Mr. John S. Coke* and *Mr. A. J. Sherwood*, with an oral argument by *Mr. Sherwood*.

For respondent there was a brief over the names of *Messrs. Clarke, Blake & Liljeqvist*, with oral arguments by *Mr. Francis H. Clarke* and *Mr. J. M. Blake*.

MR. JUSTICE EAKIN delivered the opinion of the court.

At the trial plaintiff offered in evidence the decree of the United States District Court for the District of Oregon, above referred to, for the purpose of showing that the receiver was discharged, and that plaintiff's cause of action against the receiver was continued against defendant company. It was competent, for this purpose,

but objection was made to a portion thereof, relating to matters that were stricken out of the complaint. There is nothing in the record to show what was stricken out of the complaint, or what portion of the decree was objected to, and therefore there is nothing for us to consider, and, if there is anything stated in the decree that might have been prejudicial to the defendant's case, its effect should have been limited by proper instructions.

There are several assignments of error based on the admission of evidence as to the relative duties of the head brakeman and the rear brakeman, and as to whether it was negligence for plaintiff to attend to this switch, which ordinarily was the duty of the head brakeman. Plaintiff testified that Thomas was first brakeman and plaintiff second; that he is supposed to ride upon the rear end of the train, while the first brakeman is supposed to ride on the front end, but that they worked together generally; that his duties depended on his position. If he was where he could open a switch, he would do it. As to the duties of the second brakeman, he says:

"Well, it was just owing to what we were working at. If we happened to be in a place it was convenient for the second brakeman to be on the engine, he would be there, and, if convenient for the other brakeman to be at the rear of the train, he would be there. * * A person would be wherever it was necessary for him to be."

There is nothing in the evidence indicating that the duties of the second brakeman were limited to any part of the train, or that the work of the first and second brakeman was so divided that it would be a violation of the rules or negligence for either of them to perform any duty of the other. At least, it is evident that plaintiff had no knowledge of such a distinction.

1. Whether it was negligence for plaintiff to ride on the step of the tender from Beaver Hill Junction over the trestle is immaterial, as he was not injured in going over the trestle or by reason of riding on the step. The

question is whether it was negligence to be on that step when he approached the switch. This cannot as a matter of law be said to be contributory negligence. Albert Abbott, defendant's train manager, testified in reference thereto:

"Q. How do they (the brakemen when the engine is backing up) go from the tender to the ground to turn the switch?

"A. Generally go down the steps at the back part of the tender. That is what it is for, to get on and off there."

Another witness says that on that step was the proper place for him when getting in readiness to turn a switch. This was the only act of contributory negligence alleged, and whether it was negligence was properly left to the jury.

2. It is apparent from plaintiff's own testimony that he knew the Klondyke switch was open, and he was acting upon that knowledge when injured. He says he took the position on the step of the tender "for the purpose of throwing this switch on the trestle" (meaning the Klondyke spur switch).

"I had an awfully good idea that it was open. * * It was reasonable to believe that the switch was left open after we pulled out with the double-header. * * It has always been the custom to never stop and line up the switch. * * I had some recollection of this switch being left open for the simple reason that we pulled out of there. * * That was one reason. Another reason was because these empties were left on the main line. I asked orders about putting them on this spur, and that was the case, and having pulled out of there it would be reasonable to suppose that it was left open."

And the other trainmen testify that a heavy train going out of that switch always left it open, and that the train returning was expected to stop and close it, so that plaintiff was undoubtedly acting upon the knowledge that this switch was open. Therefore the open switch alone

was not actionable negligence on the part of defendant, but the loaded car left on the spur increased the danger, and, if plaintiff was ignorant of its presence, a question for the jury would arise as to whether, under the circumstances, it was negligence for the company to so leave the car, and whether that was the approximate cause of the injury.

3. The negligence of defendant upon which plaintiff relies is that it left a loaded car upon the Klondyke spur and the switch open when the train pulled out, and that this was negligence, causing the injury. Plaintiff contends that the Beaver Hill branch was a main line and the Klondyke branch only a spur, and that the switch should have been kept closed in favor of the Beaver Hill line. The rule that all switches should be closed to the main line is for the protection of the public. But operatives running logging trains equally over two branches of a road, diverging from the same switch, it being usual to leave the switch open as the last train passed over it, cannot claim the benefit of that rule. If in such a case the switch was left open as the train passed out, such being the usual manner of operating these branches, and a disabled car was left on that branch, it is a question for the jury whether the defendant company is chargeable with negligence for an injury resulting to one of the operatives of such train by reason thereof. Plaintiff as one of such operatives knew his train was to be the first to pass the switch, that the switch was open, and that the train should stop and close it to take the other branch, but contends that he did not know that the loaded car had been left there. So far as relates to the use of these two branches by the logging trains, if, as indicated by the business conducted over them and the manner of their use, the switch was left open to the track last used, the operatives so using it cannot charge such use as negligence of the defendant.

4. Instruction No. 14 upon this question is as follows:

"If the jury find as a matter of fact from the evidence in this case that the line of railroad running from Beaver Hill to Beaver Hill Junction was in general use by the company for passengers and freight service, and so offered to the public, and that the line of road running from Pierce's logging camp to Klondyke Junction, and there connecting with said Beaver Hill line, was used exclusively as a logging road, then they must find that the line from Beaver Hill Junction is what would be called a main line track and the line from Pierce's logging camp to Klondyke Junction was a spur connecting with said main line track, and that the two lines were so operated together subject to the rules, regulations, customs, and practices of railroads as to main lines and spur tracks, respectively."

This we think was error. If it were a claim for damages by a passenger injured by reason of the open switch, the instruction might have been proper, but it was error to give it under the facts of this case. It makes the company liable to the plaintiff by reason of an open switch to the same extent as to a passenger, without taking into consideration the conditions under which the roads were actually operated, plaintiff's connections therewith, and knowledge of the conditions. It is a question, considering the manner in which the logging trains were operated, whether the disabled car left on the track was an obstruction as to operatives for which defendant is liable within the rule that the company must use reasonable care in operating its road to prevent obstructions on its track dangerous to its employees.

We think the giving of this instruction was error, prejudicial to defendant's rights, and for which the cause is reversed and remanded.

REVERSED.

Argued May 5, decided July 13, 1900.

OREGON R. & N. CO. v. EASTLACK.

[102 Pac. 1011.]

APPEAL AND ERROR—JUDGMENTS APPEALABLE—FINALITY.

1. A judgment in condemnation proceedings that the land sought to be taken is appropriated and taken from defendant by plaintiff on the deposit by plaintiff of a specified sum, and without reserving anything for the court's further determination, is a final judgment, and appealable, though plaintiff did not make any deposit.

APPEAL AND ERROR—JUDGMENTS APPEALABLE—VOID JUDGEMENTS.

2. A void judgment, entered at a time when the court is without jurisdiction to award it, is reviewable on appeal.

EVIDENCE—COMPENSATION—COMPETENCY.

3. In condemnation proceedings, evidence of what plaintiff paid for other property for use in the same enterprise is incompetent, whether offered as substantive evidence, or on cross-examination as a test of an expert's knowledge.

TRIAL—OBJECTIONS TO EVIDENCE—SUFFICIENCY.

4. The rule that objections to evidence must be specific does not apply, where the evidence is clearly inadmissible for any purpose, in which case a general objection is sufficient.

TRIAL—RECEPTION OF EVIDENCE—OBJECTIONS.

5. In condemnation proceedings, an objection to evidence of what plaintiff paid for other property for use in the same enterprise, on the ground that the evidence was not the measure of value, was sufficient to raise the question of the admissibility of such evidence, offered as substantive evidence, or on cross-examination as a test of an expert's knowledge of value.

EVIDENCE—RELEVANCY—VALUE.

6. In condemnation proceedings, evidence of what the property was sold for, or was estimated to have brought, in an exchange made twelve or fifteen years before, is inadmissible.

EVIDENCE—OPINIONS—FACTS FORMING A BASIS OF OPINION.

7. In condemnation proceedings, a witness cannot base his opinion of the value of the land sought to be taken on what he had heard plaintiff had paid for other land for use in the same enterprise.

From Union: JOHN W. KNOWLES, Judge.

This action was brought to condemn land by the Oregon Railroad & Navigation Co. against John Eastlack and others. From a judgment awarding the property to plaintiff on payment of a specified sum, it appeals.

REVERSED.

For appellant there was a brief over the names of *Mr. William W. Cotton* and *Mr. Arthur C. Spencer*, with oral arguments by *Mr. Spencer* and *Mr. Thomas H. Crawford*.

For respondent there was a brief over the names of *Messrs. Ramsey & Oliver*, with an oral argument by *Mr. William M. Ramsey*.

MR. JUSTICE SLATER delivered the opinion of the court.

This action was brought to condemn for the use of the plaintiff lots 2, 3, 4, and 5, in block 12, of Riverside addition to the town of La Grande, to enable it to construct additional side tracks, switching facilities, and repair shops in its depot grounds in said city. The complaint is in the usual form, alleging the plaintiff's corporate existence; the extent and character of its business as a common carrier; the necessity of the use of said lots in the performance of its public duties; its inability to agree with the owners as to the value thereof, which, it is averred, does not exceed \$250.

The answer admits the material averments of the complaint, except the alleged value of the land sought to be taken, which is therein stated at \$3,000. At the trial plaintiff called J. B. Eddy to testify in its behalf as to the value of the lots. After stating that for seven or eight years he had been assistant right of way agent of the plaintiff, and during that time had been familiar with the lots in question, and otherwise qualifying to the satisfaction of the court as a competent witness, he testified that the lots were worth \$100 to \$150 a lot, according to the lay of the land. On cross-examination he was asked: "You bought block 13 from Mr. Grandy?" The answer was, "Yes." He then was asked: "Tell us what the Oregon Railroad & Navigation Company paid for block 13." This was objected to by plaintiff "as not the measure of valuation." Before a ruling was made by the court, counsel for defendant asked: "When did you buy block 13?" To which the answer "I guess about a year ago," was given. Then the court overruled the previous objection, and the question was repeated in this form: "What did you pay for block 13?" To which witness replied: "I paid \$5,000 for block 13." Again

witness was asked: "You bought lot 6 in block 12 also?" To which counsel for plaintiff objected as incompetent, irrelevant, and immaterial. The objection was overruled; and, after stating that lot 6 was bought in connection with a parcel of land lying south of block 13, witness was asked what he paid for lot 6 and the parcel south of block 13. The answer was, "\$5,000." After witness had answered, plaintiff interposed the same objection as previously made. But, the court declining to rule on the objection because the question had been answered, plaintiff moved to strike out the answer as incompetent, irrelevant, and immaterial. This was denied. B. W. Grandy, as witness for plaintiff, testified that the lots were worth \$400 to \$500. On cross-examination he stated he at one time had owned them, and that 12 or 15 years ago he sold them to Mr. Crane, from whom defendants inherited the property. He was then asked: "What was the consideration for the sale?" Witness said he traded the lots for a piece of land. He was asked: "What did you regard these lots as worth in that trade?" This was objected to as "incompetent, irrelevant, and immaterial, unless it was a cash proposition, or something that can be measured by money; this not being evidence of market value." The objection was overruled, and the witness answered: "He asked \$600 for the property, and I asked \$400 for the lots—we traded that way, and I gave him \$200 to boot. That's the way we traded." This witness was also required to state, over plaintiff's objections, that he and his son had sold said block 13 to plaintiff for \$5,000. Fred Hamilton was called by the defendant to testify as to the value of the lots. He stated he had seen these lots, and, being asked what he knew about the value of real estate in that vicinity, said he knew "only what other property was selling for in that neighborhood." Being asked what was the value of the lots in question for any purpose to which they can be applied, an objection was made that witness had not shown

himself qualified to testify. This was overruled, and witness answered: "Well, as I stated before, I based my opinion on what other land in that vicinity is selling for. I have been told that land in there—they lots in there—that Mr. Grandy sold eight lots for \$5,000 to \$6,000." The question being renewed, witness said: "Well, I would not like to say, because I really don't know exactly." On plaintiff's motion the former answer was stricken out. The same question was again asked, and the answer was: "Why, if these Grandy lots are worth \$5,000 on a closed street, then these lots, I should think, should be worth on an open street at least one half." This was also stricken out, and the jury instructed not to consider it. Witness was again asked to state what in his judgment these lots are worth without making reference to any other property, and he answered: "Well, I should say, \$2,500." On cross-examination witness stated that his opinion as to the value of this property was based on what he had heard the Grandy property had sold for, and, based thereon, plaintiff moved to strike out this testimony, which motion was denied. A verdict for \$1,300 was rendered in favor of defendant, and a judgment was entered appropriating the property to the plaintiff upon the payment of the said sum, from which plaintiff has appealed, assigning as errors the several rulings of the court above stated.

ON MOTION TO DISMISS.

1. Defendants have moved to dismiss the appeal upon the ground that the judgment from which the appeal is attempted to be prosecuted is not a final judgment or order, that it is a void judgment, and that plaintiff had abandoned the proceedings. The argument is that because the judgment upon its face shows that plaintiffs never paid to the clerk of the court below the amount of damages assessed by the jury, as required by Section 5102, B. & C. Comp., the court had no power to enter any

judgment, and hence what it attempted to do in that respect is a nullity. The question whether the court had power to render and enter an order or judgment of the character disclosed by the record has been discussed at considerable length by counsel, but we are of the opinion that in order to sustain the jurisdiction of this court to entertain this appeal, it is not essential to determine that question. Conceding all that defendants claim as to the effect of the judgment with respect to a transfer of title, it is nevertheless a judgment in form. It concludes the parties as to plaintiff's right and power to condemn, the amount to be paid for the property, and the payment of costs, and adjudges "that said lands hereinbefore particularly described, and the title to the same as it obtained and existed upon the date of the filing of the complaint in this case, be and the same is hereby appropriated and taken from the defendants to this plaintiff upon the deposit by the plaintiff in lawful money of the United States of the sum of \$1,300," etc. Nothing was reserved by the court for its further consideration or determination, but as to it the judgment entered was a final act.

2. As to the plaintiff, it was required to pay the amount thereby adjudged as lawful damages before it can acquire any title, and upon making payment it would be entitled to execution if the judgment was not void. But a void order or judgment, made or entered at a time when the court is without power or jurisdiction to award it, is nevertheless reviewable on appeal. *Trullenger v. Todd*, 5 Or. 36; *Smith v. Ellendale Mill Co.*, 4 Or. 70; *Deering v. Quivey*, 26 Or. 556 (38 Pac. 710); *Hoover v. Hoover*, 39 Or. 456 (65 Pac. 796). Under the statutes of some states a failure of the condemning party to pay the amount of the award within a fixed time after the confirmation of the award, or the entry of the final judgment in the condemnation proceedings, amounts to an abandonment of the proceedings. 15 Cyc. 940. But

we have no such statute here, and without it this court has no power to limit or curtail the right given by the statute to appeal when that right has once attached. In the case of *Oregonian Ry. v. Hill*, 9 Or. 378, there was no assessment of damages by the court or by a jury, but a judgment *in personam* was rendered upon the allegations in the answer as by default, and in *Oregon Ry. Co. v. Bridwell*, 11 Or. 282 (3 Pac. 684), a jury assessed the damages, but a personal judgment was entered for the amount. In each of these cases the judgment was held to be without authority of law and a nullity, yet an appeal therefrom was entertained. It follows that the motion to dismiss must be overruled.

ON THE MERITS.

3. The several assignments of error respecting the rulings of the court on admission of the evidence of Eddy and Grandy may well be considered together, as they involve the same principle. There appears to be some conflict of judicial authority upon the question whether in proof of value, evidence of particular sales is admissible. The preponderance of authority, however, supports the affirmative of this proposition. There is a variety of judicial utterance, especially in appropriation or eminent domain cases, upon the question of the admission of collateral evidence of values. It is stated by Mr. Elliott, in volume two of the second edition of his work on Railroads, at section 1036:

"It is held that evidence of the selling value of lands in the neighborhood may be given, as tending to establish a basis from which the landowner's damages can be assessed in cases where the land taken is not shown to have any definite market value; but, as a general rule, where there is a definite market value, that value should be taken as the basis for estimating compensation. Evidence of actual sales of such lands has been held admissible in cases where the market value of the land sought to be condemned was in dispute, though other authorities hold such evidence inadmissible upon the ground that it is

the general selling price of land in the neighborhood which is the test of its value, and not the price paid for particular pieces of property. The sales proven must have been of land similar in character and location to that condemned, and must have been made near the time of taking."

That author is inclined to doubt the soundness of the cases which hold evidence of particular sales to be competent, although he thinks it proper to test the knowledge of witnesses by asking them, on cross-examination, whether they know of such sales. In support of this view the following cases may be consulted: *East Pa. R. v. Hiester*, 40 Pa. 53; *Pa. & N. Y. R. Co. v. Bunnell*, 81 Pa. 414; *Pa. & S. V. R. v. Ziemer*, 124 Pa. 560 (17 Atl. 187); *Montclair R. Co. v. Benson*, 36 N. J. Law 557; *C. P. R. Co. v. Pearson*, 35 Cal. 247-262; *Selma R. & D. R. Co. v. Keith*, 53 Ga. 178; *In re Thompson*, 127 N. Y. 463 (28 N. E. 389; 14 L. R. A. 52). On the other hand, the propriety of allowing proof of the sales of similar property to that in question, made at or about the time of the taking, is said by Mr. Lewis on Eminent Domain (Volume 2, § 443) to be "almost universally approved by the authorities." See, also, 1 Wigmore, Evidence, § 463. It is conceded, however, in those jurisdictions excluding such testimony as substantive evidence of value, that on cross-examination of an expert witness testifying as to value, for the purpose of testing his knowledge of the market value of land in the vicinity, he may be asked to name such sales of property, and the prices paid therefore, as have come to his attention. *In re Thompson*, 127 N. Y. 463 (28 N. E. 389; 14 L. R. A. 52); Elliott, Railroads (2 ed.) § 1036; Greenleaf, Evidence (15 ed.) § 448; *C. P. R. Co. v. Pearson*, 35 Cal. 247, 262; *Kansas City & T. R. Co. v. Vickroy*, 46 Kansas 248, 250 (26 Pac. 698); *Chicago K. & N. R. Co. v. Stewart*, 47 Kan. 703, 706 (28 Pac. 1017). Whatever may be the better rule upon the controverted question of the admissibility of particular sales as substantive

evidence of value, we are not now called upon to determine, for in any event it appears to be conceded by most of the cases that what the party condemning has paid for other property to be used in the same enterprise is incompetent, whether offered as substantive evidence, or on cross-examination as a test of an expert's knowledge of value. 2 Lewis, Eminent Domain, § 447.

"Such sales are not a fair criterion of value" says that eminent author, "for the reason that they are in the nature of a compromise. They are affected by an element which does not enter into similar transactions made in the ordinary course of business. The one party may force a sale at such a price as may be fixed by the tribunal appointed by law. In most cases the same party must have the particular property, even if it costs more than its true value. The fear of one party or the other to take the risk of legal proceedings ordinarily results in the one party paying more, or the other party taking less, than is considered to be the fair market value of the property."

It is claimed by the defendants' counsel that the questions propounded to Eddy on cross-examination, by which he was required to state the amounts paid for block 13, and for lot 6 in block 12, with other adjacent property, was not for the purpose of offering substantive testimony as to value, but to test the knowledge of the witness. The form of the interrogatories and the general character of the cross-examination of the witness do not indicate that any such limitation was intended. The court in ruling upon the offer did not so limit the effect of the evidence received, and we have no doubt the jury understood and treated the evidence as proof of value. But, however that may be, under any view that may be taken of the matter it was not admissible.

4. It is also claimed by the defendants' counsel that the form of the objections made to the admission of testimony is not sufficiently specific to raise the question on which the evidence might have been excluded. It

was first objected to "as not the measure of value." This went to the substance of the evidence, and shows for what purpose opposing counsel understood it was offered. The challenge appears to have been accepted in that view by the party offering it; otherwise it was his duty to have restricted the purpose of the inquiry, so as not to have gained any unfair advantage from the effect of the evidence when admitted. However, a party has a right to waive the application of the rules of cross-examination made for his protection; and, if this evidence were admissible for any purpose, we would be inclined to hold otherwise as to the error raised by this objection and the general objections following it made to the same character of evidence.

"The general rule that objections to evidence must be specific, admits of this exception: That if they cannot in any manner be obviated, or if the evidence is clearly inadmissible for any purpose, a general objection will suffice." 8 Enc. Pl. & Pr. 228.

5. It is claimed by the defendants' counsel that, when the evidence was taken as to what plaintiff paid for block 13, and for lot 6, block 12, and the additional irregular piece, there was no suggestion that such pieces were bought for station purposes. The bill of exceptions recites that "there was no evidence on the part of the plaintiff at the time of the trial that plaintiff or Mr. Eddy paid Grandy more for block 13, * * than it was worth when it was purchased; the only claim being that the same was part of the property acquired by the railroad company in extending its yards." Whether the "claim" mentioned was presented in the form of evidence or by argument of counsel is not specifically stated. It can be rightfully inferred that it was by evidence. But it is certified that such claim was made, and the record contains a plat offered in evidence showing the relative position of these blocks and lots with reference to the property in question, and also to plaintiff's track and

yards. From this it appears that a part of them lie between plaintiff's tracks and the property sought to be taken in this suit. The property in question could not well be used for general yard purposes without also using block 13, and lot 6 in block 12, and the triangular piece between block 13 and plaintiff's tracks. The whole situation is quite similar to that developed in the case of *Metropolitan St. Ry. Co. v. Walsh*, 197 Mo. 392 (94 S. W. 860) where the evidence was held sufficient to show that the other lands mentioned in the evidence were purchased for use in connection with the land sought to be condemned. For these reasons we are impelled to hold that substantial error was committed in admitting such testimony.

6. Grandy was required, over plaintiff's objections, to state for what he had sold the premises, now in controversy, to one Crane 12 or 15 years before. This was improperly received. If the owner has purchased the property within a time so recent that its cost will afford any fair indication of its present value, it has been held by some courts that it is competent to show the cost; but what the property may have sold for, or may be estimated to have brought in an exchange made 12 or 15 years before, affords no proper basis for determining its present value. *Denver R. Co. v. Schmitt*, 11 Colo. 56 (16 Pac. 842). For the same reason the testimony of Susan Eastlack to the same effect and the deed of Grandy to Crane were inadmissible.

Hamilton testified in defendants' behalf, as one acquainted with market value of town lots in that vicinity, that the value of the lots in question was at least \$2,500, but on cross-examination it developed that his opinion was based exclusively upon what he had heard plaintiff had paid Grandy for block 13. Plaintiff moved that his testimony be stricken out, which was denied. This was error, because what plaintiff paid Grandy was not a fair criterion of value, and an opinion based thereon

was valueless as evidence of the general market value.

Other errors are assigned; but as they will not likely recur on a retrial of the case, which appears to be unavoidable, there is no necessity to refer to them at this time.

The judgment is reversed and the cause remanded for a new trial.

REVERSED.

Decided July 18, 1909.

ANDERSON v. McCLELLAN.

[102 Pac. 1015.]

APPEARANCE—SERVICE OF SUMMONS—WAIVER.

1. A defendant waives his right to object to a judgment for want of proper service of summons by appearing and asking leave to answer to the merits.

JUDGMENT—DEFAULT JUDGMENT—VACATION—GROUNDS.

2. Where substituted summons was had on defendant, a minor 19 years of age, by serving same on his mother, and thereafter the mother was appointed guardian *ad litem*, and served with summons, and subsequently, no appearance having been made, another guardian *ad litem* was appointed and appeared in open court announcing that he had no defense and declining to plead, and it did not appear that defendant took any interest in the matter, though counsel had been consulted, the court did not abuse its discretion in refusing to open judgment against him.

INFANTS—GUARDIAN AD LITEM—DISQUALIFICATION.

3. That a client of some of the attorneys in the case was appointed guardian *ad litem* for an infant defendant, did not disqualify him from serving defendant as such, unless the retainer was in the matter relating to the subject in dispute.

JUDGMENT—DEFAULT JUDGMENT—OPENING DEFAULT—DISCRETION OF COURT.

4. The granting or refusing the motion to open a default is a matter resting in the sound discretion of the court, and its exercise will not be disturbed, except for abuse of that discretion.

From Grant: GEORGE E. DAVIS, Judge.

Statement by MR. JUSTICE MCBRIDE.

George W. Anderson, plaintiff, brought ejectment proceedings against Theodore McClellan, Arizona McClellan and George Bowsman, defendants, to recover certain lands situated in Grant County. Summons was served upon Theodore McClellan and Arizona McClellan personally, but, George Bowsman not being at what the sheriff deemed his legal place of residence, substituted service was made upon Mrs. Arizona McClellan, his mother. The sheriff's return on the summons is as follows:

"State of Oregon, County of Grant, ss: I hereby certify that on the 25th day of August, 1908, near Mt. Vernon, in Grant County, Oregon, I served the within summons on the within named defendants, Theodore McClellan and Arizona McClellan, by delivering to each thereof in person a true and correct copy thereof, prepared and certified to by me, as sheriff of said county, Oregon, together with a copy of the complaint certified to by V. G. Cozad, one of the attorneys for plaintiff; and that I served the within summons on the within named George Bowsman, by delivering a true and correct copy thereof prepared and certified to by me as sheriff of said county, together with a copy of the complaint certified to by V. G. Cozad, one of the attorneys for plaintiff, to Arizona McClellan, a white person, over the age of fourteen years, and mother of said George Bowsman, at the usual place of abode of said George Bowsman, in Grant County, Oregon, being unable to find the said George Bowsman in person."

George Bowsman was a minor, nineteen years of age, and on the 11th day of September, 1908, plaintiff filed a petition praying that F. S. Slater be appointed his guardian *ad litem*. The court thereupon appointed his mother guardian *ad litem*, and directed that she be served with summons and copy of the complaint. On the 12th day of September, 1908, a summons, directed to her as guardian, was served. On the 23rd day of September, 1908, no appearance having been made for George Bowsman, plaintiff's attorneys again asked that F. S. Slater be appointed, and the court appointed him to look after the interest of said minor. On September 24th Slater appeared in open court and announced that he had no defense to make for said minor, and declined to plead to plaintiff's complaint, and defendant was adjudged in default and judgment was rendered against him. The McClellans had previously made default. On November 4, 1908, Bowsman asked for the appointment of Mrs. McClellan as guardian *ad litem* for the purpose of moving to vacate the judgment against him and she was thereupon

appointed, and, appearing specially by her attorneys, filed a motion to vacate it. On December 3, 1908, the motion was argued and denied by the court. On December 9th Bowsman, by his guardian *ad litem*, filed a motion to vacate the judgment and for leave to answer, accompanied by affidavits and an answer, denying the allegations of plaintiff's complaint, and setting up title in fee simple in himself. Plaintiff filed a counter affidavit of the sheriff of Grant County, and, after argument, the motion was denied. Defendant Bowsman by his guardian—Arizona McClellan—appeals from the judgment by default, from the order refusing to vacate the judgment, and from the second order refusing to open the judgment and permit him to answer. **AFFIRMED.**

Submitted on briefs under the proviso of Rule 16 of the Supreme Court. 50 Or. 580 (91 Pac. XII).

For appellant there was a brief over the names of *Messrs. Hicks & Marks*.

For respondent there was a brief over the names of *Mr. V. G. Cozad, Messrs. Cattnach & Wood, and Mr. M. Dustin*.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

1. The defendant waived his right to object to the judgment for want of proper service of summons by appearing and asking leave to answer to the merits. *Mayer v. Mayer*, 27 Or. 133 (39 Pac. 1002). It will not therefore be necessary to discuss the various objections raised by defendant's counsel to the sufficiency of the service or the regularity of the judgment.

2. The defendant presented affidavits attempting to excuse his lack of diligence in making an appearance in the cause. A copy of summons and complaint was left with his mother for him on August 25, 1908, and he claims in his affidavits that he did not return home for 15 days afterward, which would be on the 9th of Septem-

ber. No default had been taken against him at that time, and on the 11th of September his mother was appointed his guardian *ad litem*, and on September 12, 1908, summons directed to her as guardian was served upon her, and it appears from the affidavit of the deputy sheriff that Geo. Bowsman was present at the time of this second service; that both he and his mother conversed with the sheriff about the case; and that Geo. Bowsman read over the papers. On the same date the guardian wrote the sheriff a letter, stating that she had shown the summons to a lawyer, and that the proceedings were fraudulent and generally berated the deputy sheriff and everybody else connected with the case. The time having expired for defendant to plead, and no answer or appearance having been made, counsel again asked that Mr. Slater be appointed to appear for the minor defendant. The court appointed him, and the next day he appeared and declined to make any answer or defense.

3. On the face of the proceedings it appears that the court was very indulgent in appointing a second guardian after the first had made default, and there seems to have been an honest effort to get the parties into court. While defendant Bowsman was a minor, yet it would seem that he was certainly old enough to have taken some interest in his own affairs. In this state it has been held that persons of this age are so capable of judging of their own affairs that they may be subject to a suit for asserting an unjust claim to real property. *Harding v. Harding*, 46 Or. 178 (80 Pac. 97). Of course, he could not appear except by guardian, but he seems not to have taken any interest in the matter in any way, although according to his mother's statement counsel had been consulted in the matter. There is nothing to impeach the good faith of Slater except the statement of defendant that he was a client of some of the attorneys. The extent of his business as such client does not appear, and that relation would not disqualify him from serving as guard-

ian, unless the retainer was in a matter relating to the subject in dispute.

4. As defendant was already in default by the failure of his former guardian to answer in the case, the appointment of Slater was unnecessary, and, even if he had been disqualified, no harm would have resulted. It is fair to presume that the circuit judge had knowledge of Mr. Slater's character and qualifications, and that he would not have appointed him unless he had known him to have been a fair man. Granting or refusing a motion to open a default is a matter resting in the sound discretion of the court, and its exercise will not be disturbed, except for abuse of that discretion. *Hanthorn v. Oliver*, 32 Or. 57 (51 Pac. 440; 67 Am. St. Rep. 518).

After a careful examination of the affidavits filed in this case, we cannot say that the court below abused its discretion in refusing to open the judgment in this case. The judgment of the lower court is affirmed.

AFFIRMED.

Argued on the merits April 8, decided July 13, 1909.

FERRARI v. BEAVER HILL COAL CO.

[94 Pac. 181; 95 Pac. 498; 102 Pac. 175; 102 Pac. 1016.]

APPEAL—DEFECTS IN TRANSCRIPTS—CORRECTION—TIME.

1. Under rule 35, 20 Or. 587 (91 Pac. XII), providing that, for the purpose of correcting any defect in the transcript from the court below, either party may suggest the same, and on good cause shown obtain an order on the proper clerk certifying the whole or part of the record as may be required, an application for an order to supply the record will be granted, although not made until after the motion to dismiss the appeal has been submitted.

APPEAL—NOTICE—SUFFICIENCY.

2. Under Section 545, B. & O. Comp., providing that a notice is valid, though defective as to the name of the court, etc., if it intelligibly refers to the action, a notice of appeal which intelligibly referred to the action in which the appeal was taken was valid, though it was entitled in the Circuit Court of the United States for a certain county instead of in the circuit court of such county.

HOLIDAYS—JUDICIAL PROCEEDINGS—"JUDICIAL BUSINESS."

3. Under the statute providing that no court shall be open nor any judicial business be transacted on legal holidays, service of notice of appeal is not judicial business, and such notice may be served on a legal holiday other than Sunday.

APPEAL—MOTION TO DISMISS—QUESTIONS REVIEWABLE.

4. The Supreme Court will not on motion to dismiss an appeal review the action of the trial judge in permitting the undertaking on appeal to be filed after the expiration of the time allowed by law.

APPEAL AND ERROR—RECORD—AMENDMENT—AUTHORITY OF TRIAL COURT.

5. The trial court may, on application therefor, and notice thereof to the adverse party, make an alteration in the original bill of exceptions, provided the amendment is duly made, properly certified, and filed in the Supreme Court before the rendition of a decision on the merits.

EVIDENCE—FACTS AND CONCLUSIONS.

6. Where the complaint, in an action for injuries to a coal miner engaged in taking cars up and down an incline, alleged that the master negligently permitted the signal system used in the miner's work to get out of repair, and that the master was negligent in the manner of moving the cars on the incline, the testimony of the miner that the signal system was out of repair, and that the cars could have been let down the incline by steam power, stated facts, and not the conclusion of the witness.

APPEAL AND ERROR—OBJECTIONS—REVIEW.

7. Objections, to be available on appeal, must be on the ground on which the error is predicated.

MASTER AND SERVANT—INJURIES TO SERVANT—PROXIMATE CAUSE—EVIDENCE.

8. A servant suing for a personal injury, who introduces evidence of the defective condition of an appliance, as alleged in the complaint, must show that the injury might have been avoided if the appliance had been in repair.

APPEAL AND ERROR—QUESTIONS NOT RAISED BELOW—INSTRUCTIONS—REQUEST.

9. Though the evidence of a negligent act should have been taken from the jury, in the absence of a request therefor, no error could be predicated because of the failure to do so.

DAMAGES—PERSONAL INJURY—EVIDENCE—ADMISSIBILITY.

10. In an action by an infant for personal injury, his testimony as to the length of time he was able to work after the injury, and prior to the trial, was competent to show the extent of the injury and the probable effect it might have on his future earning capacity, though no damages could be assessed for loss of time during his minority.

APPEAL AND ERROR—HARMLESS ERROR—EVIDENCE—INSTRUCTIONS.

11. Where the court, in an action by an infant for personal injuries, charged that no damages could be assessed for loss of time during minority, it would not be presumed that defendant was prejudiced by the testimony of plaintiff as to the length of time he was able to work after the injury and prior to the trial.

MASTER AND SERVANT—INJURY TO SERVANT—EVIDENCE OF SUBSEQUENT CONDUCT.

12. In an action for injuries to a coal miner while working on an incline, permitting the engineer, who had made a plat offered in evidence, to testify on cross-examination that guard rails had been placed on the incline since the accident, was not erroneous, where the court charged that the jury should not consider the evidence as proof of negligence.

NEGLIGENCE—EVIDENCE OF SUBSEQUENT CONDUCT.

13. Evidence of additional precautions or of subsequent repairs is not competent to prove antecedent negligence, but it may be competent as show-

ing that the property where the injury was received belonged to, or was in control of, defendant.

APPEAL AND ERROR—PREJUDICIAL ERROR—REFUSAL OF INSTRUCTIONS.

14. Where, in an action for injuries to a coal miner while operating cars on an incline, the safety of the incline was not treated as an issue at the trial, and the testimony that the incline was in a reasonably safe condition was not questioned, the refusal to charge that there was no testimony that the incline was not built in the usual manner, etc., was not prejudicial.

MASTER AND SERVANT—OBLIGATION OF MASTER.

15. A master must point out the unusual and extraordinary risks of the employment, and call the attention of the servant to them, and warn him of the danger.

MASTER AND SERVANT—INJURY TO SERVANT—ASSUMPTION OF RISK.

16. An infant servant assumes the ordinary hazards and risks of his employment that he, through his intelligence, knows, or should know and appreciate, and he assumes the dangers that are so open and obvious that one of his age, capacity, and experience would, in the exercise of ordinary care, know and appreciate.

MASTER AND SERVANT—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

17. That a servant suing for personal injuries is immature in years and inexperienced in the work, is important in determining the question of his contributory negligence.

MASTER AND SERVANT—INFANT SERVANTS—OBLIGATION OF MASTER.

18. A master employing an infant inexperienced in the work must give him sufficient notice of the dangers incident to and attending the employment.

MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—FAILURE TO ADOPT RULES.

19. The question whether the master was at fault in failing to adopt suitable rules is not for the jury, unless there is something in the testimony from which the inference may be drawn that it was practicable to have provided against the occurrence of the accident complained of by such a rule.

MASTER AND SERVANT—INJURY TO SERVANT—FAILURE TO ADOPT RULES—NEGLIGENCE.

20. Whether a master was negligent in omitting to adopt suitable rules for the guidance of the servants, *held*, under the evidence, for the jury.

MASTER AND SERVANT—INJURY TO SERVANT—ASSUMPTION OF RISKS—QUESTION FOR JURY.

21. Whether an infant coal miner assumed the risks incident to his employment, including the taking of defective cars to a shop, *held*, under the evidence, for the jury.

APPEAL AND ERROR—INSTRUCTIONS—REQUESTS—NECESSITY.

22. A party complaining of the instructions on the measure of damages, in an action for personal injuries, which correctly state the law as far as they go, must request additional instructions; and, in the absence of such request, he cannot urge omissions in the instructions as reversible error.

APPEAL AND ERROR—DISMISSAL AS TO CODEFENDANT.

23. A judgment against one defendant, in an action for negligence, treated during the trial as against such defendant alone, amounts to a dismissal as to

codefendant, within Sections 180, 181, B. & O. Comp., and defendant, interposing no objection, is not prejudiced thereby.

From Coos: JAMES W. HAMILTON, Judge.

This is an action by James Ferrari, a minor, by Rosa Ferrari, guardian of his person and estate, against the Beaver Hill Coal Company, a corporation, and Daniel Maher, one of its employees, to recover damages for an injury. From a judgment in favor of plaintiff, defendants appeal. On motion to dismiss appeal and counter motion on clerk to supply record.

MOTION TO SUPPLY RECORD ALLOWED.

Decided March 10, 1908.

MOTION FOR RULE ON CLERK TO SUPPLY RECORD.

[94 Pac. 181.]

Mr. John S. Coke for the motion.

Messrs. Blake & Liljeqvist, contra.

Opinion by MR. CHIEF JUSTICE BEAN.

1. On February 3, 1908, a motion to dismiss the appeal in this case, on the ground that notice thereof had not been served or filed within the time required by statute, was, by stipulation of the parties, submitted on written briefs. Pending the disposition thereof, the appellants suggested to the court a diminution of the record, and asked for a rule on the clerk below to send up a notice of appeal, which, it is alleged, was served and filed within the statutory time, but which is not included in the transcript. The allowance of this motion is resisted because it comes too late, and reliance is had on *Cross v. Chichester*, 4 Or. 114; *Alberson v. Mahaffey*, 6 Or. 412; *State v. McKinmore*, 8 Or. 208. The technical rule announced in these cases that an application for permission to correct an error in the transcript must be made before the motion to dismiss the appeal is brought on for hearing, was practically overruled in *Elwert v. Norton*, 34 Or. 567 (51 Pac. 1097; 59 Pac. 1118); *Menden-*

hall v. Elwert, 36 Or. 375 (52 Pac. 22: 59 Pac. 805), and *Fleischner v. Bank of McMinnville*, 36 Or. 553 (54 Pac. 884: 60 Pac. 603: 61 Pac. 345), and the matter is now regulated by rule 35, 50 Or. 587 (91 Pac. xii), which provides that:

"For the purpose of correcting any error or defect in the transcript from the court below, either party may suggest the same, in writing, to this court, and, upon good cause shown, obtain an order that the proper clerk certify up the whole or part of the record, as may be required."

The court has for years adhered to a liberal practice in matters of this kind, so that neither party to an appeal shall be denied a right to be heard because of some defect in the transcript which can be cured.

The motion will, therefore, be allowed, and the rule issued as prayed for.

MOTION TO SUPPLY RECORD ALLOWED.

Decided May 12, 1908.

ON MOTION TO DISMISS.

[95 Pac. 498.]

Messrs. Blake & Liljeqvist, for the motion.

Mr. John S. Coke and Mr. A. J. Sherwood, contra.

PER CURIAM: This is a motion to dismiss an appeal, because (1) the notice of appeal is entitled in the circuit court of the United States for the county of Coos; (2) the notice was served and filed on a day appointed by the Governor as a legal holiday, and (3) the undertaking on appeal was not served and filed within the time required by law. None of these reasons are sound.

2. The notice of appeal intelligently referred to the action in which the appeal was taken and is valid and effective, notwithstanding the mistake in the name of the court in the title. Section 545, B. & C. Comp. That was evidently a mere clerical error, and does not affect the merits in any way.

3. A legal holiday, other than Sunday, affects only those acts and transactions which are designated in the law establishing the day. The statute, providing for legal holidays, declares that no court shall be open nor any judicial business be transacted on such day, except for certain specified purposes, and under the rule above stated all other acts are legal. Service of notice of appeal is not judicial business within the meaning of the statute, and such a notice may, therefore, be served on a legal holiday. 21 Cyc. 443.

4. The undertaking was not served and filed within time, but the judge of the court below, on motion of appellant, permitted such undertaking to be filed after the expiration of time allowed by law, and we cannot review his reasons for doing so on motion to dismiss an appeal.

MOTION DENIED.

Decided June 8, 1909.

ON MOTION TO STRIKE OUT AMENDED BILL OF
EXCEPTIONS.

[102 Pac. 175.]

Mr. J. M. Blake, for the motion.

Mr. A. J. Sherwood, *Mr. Ralph W. Wilbur*, and *Mr. John D. Goss*, *contra*.

PER CURIAM:

5. This is a motion to strike from the files an amended bill of exceptions. After the cause was argued and submitted, but before an opinion had been written, or a decision rendered herein, the trial court, upon application therefor, and notice thereof to the adverse party, made at a subsequent term a *nunc pro tunc* order, changing in some particulars an instruction set out in the original bill of exceptions, so as to make the alteration correspond with that part of the charge as it was given to the jury. The right of a trial court to make such an alteration, though denied in some other states, is settled

in Oregon (*State ex rel. v. Estes*, 34 Or. 196, 204 [51 Pac. 77: 52 Pac. 571: 55 Pac. 25]; *Bloch v. Sammons*, 37 Or. 600 [55 Pac. 438: 62 Pac. 290]), provided the amendment is duly made, properly certified, and filed in this court before a decision on the merits has been rendered in the cause (*State v. Jennings*, 48 Or. 483, 493 [87 Pac. 524: 89 Pac. 421]).

The amended bill of exceptions having been prepared, authenticated, and sent up according to the manner, and within the time indicated, the motion is denied.

MOTION DENIED.

Decided July 18, 1909.

ON THE MERITS.

[102 Pac. 1016.]

Statement by MR. JUSTICE KING.

This is an action by James Ferrari, a minor, by his guardian, against the Beaver Hill Coal Company and Daniel Maher, one of its employees, for damages arising from an injury received while in its employ.

Plaintiff at the time of the injury was engaged in the occupation of what is termed a "trip rider" or "rope rider," on the surface incline of the mine of the defendant company, and his duties consisted in taking cars up and down the incline trestle leading from the yard at the mouth of the mine, to the platform at the head of the incline, and just above what is called the "bunkers and washers," into which the coal is dumped from the cars. The incline or trestle was about 250 feet long and rose at an angle of about 30 degrees from the horizontal, the top of which was about five feet in width, and in some places 30 feet or more from the ground. The cars were lifted from the track below the platform by means of a hoisting apparatus, consisting of an engine, drum, and cable, operated by steam power when used to bring loaded cars up the incline, but which was allowed to run loose when cars were lowered to the surface tracks

beneath, except loaded cars were drawn up the incline, when steam power was used. Plaintiff in the regular performance of his duties, would attach the cable to the head car of a string or train of cars loaded with coal, mount them, signal the engineer in charge of the hoisting engine to pull the same up the incline, and ride upon them to the platform above the bunkers, at which point it was his duty to detach the cable from the cars, and attach the same to the rear of the string or train of empty cars, which would then be lowered on the incline to the yard. In lowering the cars, except when operated by steam power, the drum is entirely controlled by a brake, consisting of two wooden blocks with shoes set against the flanges on the outside of the drum, and operated by a foot lever. The engine is reversible, and the cars without much inconvenience can be let down by steam, but this was not the method used in lowering them. When the cars were discovered to be defective, they were set out on the side track on the bunker platform, and from time to time lowered to a point near the foot of the incline, where they were switched onto a track leading to the carpenter or repair shop, and it was a part of plaintiff's duties to have charge of the defective cars when sent to the shop for repair.

Plaintiff at the time of the accident was a minor, nearly fifteen years of age, had worked for defendant several months, but had been occupying the position of trip rider only about four weeks prior to the accident, for which damages are sought. On the day before the accident a broken flange was discovered in the left front wheel of one of the cars, whereupon the car was set aside and marked "shop," indicating that it should go to the shop for repairs. Plaintiff was ordered to switch this car upon the track leading to the shop, and was told that a cotter pin, or pin holding the wheel in place, was missing, but was not informed of the broken flange. Pursuant to these directions he switched the car upon

the track, attached it to the other five cars, and started down the incline, taking his usual position upon the left-hand corner of the rear car. When the trip was about halfway down the trestle, he observed the dump car, containing the defective wheel, jump from the track and leave the rails, the left front wheel first coming off, whereupon he immediately signaled to the engineer to stop, dismounted, and immediately proceeded to descend upon the right-hand side of the trestle, climbing down one of the posts towards the ground. After moving about 45 feet the broken car left the track, carrying the others with it, taking the cable attached to the rear car over with them, the cable catching plaintiff's right foot, throwing him to the ground, and injuring the foot to such an extent as to require its amputation.

The complaint contains the usual averments, practically all of which were denied, but those upon which the case was contested and material to an understanding of the questions here presented were: That at the time of the accident plaintiff was not fifteen years old, and that while in defendant's employ as a "rope rider" or "trip rider," the accident mentioned occurred; that the accident was occasioned through defendant's gross negligence in failing to provide for him a suitable place to work; that defendant company in addition thereto, disregarding its duty to promulgate rules and regulations for the guidance and control of its employees in and about the bunkers, washer, platform, incline, trestle, engine, and hoisting apparatus, negligently, and without exercising reasonable and ordinary prudence and care for the safety of plaintiff, operated the defective hoisting apparatus and appliances in connection with, and for the purpose of, raising and lowering the coal cars upon which plaintiff was riding on the incline and trestle from which they were conducted, and negligently, and without exercising reasonable and ordinary prudence and care for the safety of plaintiff, allowed the signal system, originally installed

by defendant, and used in cennnection with plaintiff's part of the work, to get out of repair and to become useless; and that said company was also knowingly grossly negligent and careless in its manner of moving the cars down the incline, and, in wanton disregard of human life, commanded plaintiff to take down the incline a string of five cars, more or less, the front car of which it, through its employees, knew was dangerously defective, thereby, in the manner stated, subjecting and exposing plaintiff to unreasonable and unnecessary danger and hazard; and that by reason of the dangerous condition of the cars, and other careless acts mentioned, and insufficient incline or trestle, including a failure to provide the necessary rules, and failure to inform plaintiff of the dangers and hazards of his undertaking, he was injured and damaged in a manner specifically alleged.

The company answered, denying in detail the above averments, and affirmatively averred: That plaintiff at the time of and during his employment, and prior to the date of the accident, had been, and was, fully informed and instructed concerning his duties and the order and manner of their performance; that the accident occurred wholly by reason of the fault, carelessness, and negligence of plaintiff; that immediately prior to the time of the accident he had been continuously for a period of seven months in the employ of defendant company, was familiar with all the duties pertaining to his employment and fully instructed in regard to the methods of performing the same, was a competent and intelligent person, and could, by reasonable exercise of his faculties, understand and appreciate, and did understand and appreciate, all the risks and dangers incident to his occupation, and accepted his employment with full knowledge thereof; that it was a part of his regular duties to remove defective cars from the platform or washer above, and let them down the incline trestle and transfer them to defendant's shop for repairs; that all such cars were, immediately upon

discovery of their condition, plainly marked so as to indicate that they were to be repaired, and it thereupon became plaintiff's duty to remove the same from the platform carefully, and with due regard to their defective condition, and to take the same over the trestle to defendant's repair shop at the foot of the incline; that he was fully competent to know, understand, and appreciate the dangers and risks, and did know, understand, and appreciate the dangers and risks of performing this work; that when the accident and injury complained of occurred, plaintiff was engaged in letting down said incline, together with cars in good condition, a broken and defective car, the defect in which consisted of the loss or absence of a cotter pin from the right end of the front axle, thus leaving the wheel upon the end of the axle free to slip therefrom and become disengaged; that the defect was plain, visible, and apparent, and the risks and dangers in moving the same were obvious, and could have been discovered and known to plaintiff by due exercise of his faculties, and was so known, appreciated, and understood by him; that plaintiff, knowing these facts, undertook the work, and at that time had full knowledge of the defect which caused the accident; that plaintiff, upon observing the cars were falling, or about to fall, from the track or trestle, stepped from the car upon which he was standing to and upon the plank walk provided for such purposes upon the trestle, and placed himself in a position of safety and security, but afterwards voluntarily, and for no good reason or excuse, stepped over the cable attached to the cars into a position of obvious and extreme danger, and while unnecessarily in such position sustained his injuries.

Upon these issues, with others not mentioned, concerning which there was finally no controversy, the cause was tried, resulting in a verdict and judgment in plaintiff's favor and against the Beaver Hill Coal Company (herein referred to as "defendant"), for \$6,000, from which it appeals.

AFFIRMED.

For appellant there was a brief over the names of *Mr. John S. Coke, Mr. A. J. Sherwood, Mr. Ralph W. Wilbur, and Mr. John D. Goss*, with oral arguments by *Mr. Wilbur and Mr. Goss*.

For respondent there was a brief over the names of *Messrs. Blake & Liljeqvist, and Mr. Francis H. Clarke*, with oral arguments by *Mr. J. M. Blake and Mr. Clarke*.

MR. JUSTICE KING delivered the opinion of the court.

One of the principal errors assigned and relied upon at the argument was based upon an alleged refusal of the court to instruct the jury that it was only incumbent upon defendant company to provide "reasonably" safe machinery, and a reasonably safe place in which to work, relative to which it was insisted that, since the main instructions on the subject, appearing in the bill of exceptions, did not contain this qualifying word, error prejudicial to defendant was disclosed thereby. Pursuant to the subsequent holding by this court, denying the motion to strike from the files the amended bill of exceptions in this case (102 Pac. 175), the bill as amended is before us, disclosing that the instruction covering this point was given at the trial, thereby eliminating this feature from the case.

6. It is first maintained that the court erred in permitting plaintiff to testify that during the period of his employment as trip rider, and at the time of the accident, the signal system was out of repair, having reference to the system of communication between the engineer controlling the cars and the trip rider, also in allowing plaintiff to testify that the cars could have been let down by steam power, thereby enabling the engineer to retain such control of the trip as would have prevented the cars from running off the track. It is argued in support of this contention that this character of interrogatories called for the conclusion of the witness upon the issues involved. The evidence apparently sought by this line of inquiry was relevant to the issues upon the subject

to which questions were directed, and the testimony was accordingly competent for that purpose, and, when viewed from that standpoint, was calling for the facts.

7. Sufficient foundation, however, was not laid therefor; such, for example, as first showing that the witness had sufficient knowledge of the subject to entitle him to give evidence thereof, but no objection appears on either that ground, or that the question propounded called for the conclusion of the witness, from which it follows that error cannot be declared thereon. Objections, to be available on appeal, must be upon the ground upon which the error is predicated. 9 Enc. Ev. 100-106; *Hilderbrand v. United Artisans*, 50 Or. 159, 166 (91 Pac. 542).

8. The testimony relative to the signal system being out of order it is also argued should have been taken from the jury, for the reason that it conclusively appears that its condition could in no way have contributed to the accident. This question was only raised through objections made to the testimony. It is clear, since this feature was made one of the issues in the pleadings that, in the first instance, evidence bearing on this subject was competent. However, for plaintiff to have availed himself of any negligence in this respect, if any, and to have entitled the testimony offered to be considered by the jury, it was incumbent upon him to follow it up with evidence tending to show that the injury might have been avoided by the use of this system of signaling, if it had been in repair, but it clearly appears, from the testimony adduced by defendant, that this system was only used, and only intended to be used, at night-time, and on occasions, such as foggy weather, etc., when it was difficult, if not impracticable, for the engineer to see the trip rider.

9. No attempt is made to question this showing, and plaintiff in fact admits that signaling by the use of the hands was the better method. This testimony, therefore, should have been taken from the jury; but, in the absence

of a request to that effect on the part of the defendant, no error can be predicated thereon. In fact error is not assigned upon that ground.

10. Error is next based upon the ruling of the court in permitting plaintiff to testify concerning the length of time he was able to work after the injury occurred, and prior to the time of the trial. This testimony was competent for the purpose of showing the extent of the injury, and the probable effect it might have upon his future earning capacity, for which purpose it was evidently offered.

11. The court expressly instructed the jury to the effect that no damages could be assessed for any loss of time during plaintiff's minority, it cannot be presumed that it was in any manner prejudiced thereby. *Winter v. Central Ia. Ry. Co.*, 80 Iowa 443, 446 (45 N. W. 737); *Contant v. Suburban Ry. Co.*, 125 Iowa 46, 53 (99 N. W. 115; 69 L. R. A. 982).

12. The next contention relates to the answer elicited on cross-examination of defendant's witness, who was a civil engineer, and made the plat offered in evidence, to the effect that guard rails had been placed upon the trestle or incline since the accident. It is argued in this connection that, since the changes in the machinery, appliances, and place of work subsequent to the accident cannot be shown, the answer should not have been admitted in evidence; that the impression upon the jury necessarily created by the "undue importance invariably attached thereto by the average juror, and his inevitable tendency to regard such changes as a confession of prior negligence," remains with the jury, to defendant's prejudice, despite any instructions from the court to the contrary.

13. It is well settled that evidence of additional precautions or of subsequent repairs is not competent for the purpose of proving antecedent negligence (*Skottowe v. Oregon S. L. Ry. Co.*, 22 Or. 430, 438 [30 Pac. 222:

16 L. R. A. 593]); but it is equally as well established, however, and recognized by the authority last cited, that it may be competent for some other purpose, such, for example, as a circumstance tending to show that the property where the injury was received belonged to, or was in the control of, defendant, and we think the purpose for which this answer was elicited comes within that rule. The witness was merely testifying to the accuracy of the map, and for the purpose of determining whether the map represented the property at the time of the accident, or after that time, the question was proper, and the inquiry appears to have been made for no other purpose; and, having been guarded by the proper instructions to the jury on the subject, to the effect that they should not consider it as being any evidence of negligence, no error can be predicated thereon. In any event that evidence, as well as the testimony regarding the subsequent lengthening of the brake lever, was competent for the purpose for which testimony of like import was admitted in the case last cited.

14. Complaint is made because the court refused an instruction, requested by defendant, that:

"There is no testimony that this incline was not built and maintained in the usual manner, and there is no testimony that would warrant you in holding that defendant was negligent in the manner of constructing and maintaining this incline trestle."

While the safety of the incline was made an issue by the pleadings, defendant offered testimony, the purport of which was to show that the incline was in a reasonably safe condition, and this fact is in no manner attempted to be questioned by the plaintiff, further than the testimony respecting the guard rails having been constructed since the accident, which testimony was offered for another purpose, and, as hereintofore stated, was by the court properly guarded by instructions upon the subject. There is nothing in the record tending to

show that this was treated as an issue at the trial, further than an averment in the complaint bearing upon the subject. It is difficult, therefore, to understand how the defendant could, in any manner, have been prejudiced by the court submitting this question to the jury. The court might properly have instructed that there was no controversy upon this issue, and that they should be governed accordingly; but, as stated, its failure to do so, it is clear in no way worked to defendant's prejudice. If error at all, it would not justify a reversal.

15. It is next contended that the court erred in refusing to give the following instruction, requested by defendant:

"If you find that the plaintiff was of sufficient age and intelligence to understand and appreciate the dangers of his employment, and it was a regular part of said employment to let defective cars down said incline to the repair shop, and the accident occurred through a defect in one of said defective cars, whether said plaintiff knew of said defect or not, said accident was one of the risks of the business which plaintiff assumed, and you must find for the defendant."

On this phase of the case the court instructed:

"You will observe, gentlemen of the jury, that this is a question of fact for you to determine in this case as to whether or not this was a dangerous vocation in which the plaintiff was engaged, and, if so, whether the nature of his employment, whether the work in which he was engaged, belonged thereto, or was required of him thereby, or whether it was an extraordinary risk or not. You will notice that the law makes a distinction as to the risks and hazards that are extraordinary, and not the usual risks of his employment. It is the duty of the master to point out those which are unusual and extraordinary, and call the attention of the employee to them and warn him of his danger.

16. "So it is that a minor assumes the ordinary hazards and risks of his engagement that he through his degree of intelligence knows, or should know and appreciate, and consequently he assumes these dangers also that are so open and obvious to his senses that one of his age, capacity, and experience would, in the exercise of

ordinary care and prudence, common to persons of like age and experience, know and appreciate, and would be expected to be sufficiently attentive and alert to avoid. In other words, the minor's assumption of the hazards and dangers incident to his employment is to be determined by his capacity to know, understand, and appreciate them, and his caution, alertness, and aptitude as well, to avoid them. In that regard you have the right to consider the witness and his ability as to alertness and capacity, and that, of course, gentlemen of the jury, is a question for you to determine as to the facts, as to what was the nature of his employment, what was the nature of his work and what was the hazard and risk, applying the law as I have given it to you, and the law as I have given it to you is the standard by which the plaintiff is to be judged, as to whether or not he assumed the risk of this employment with a knowledge of the defects, and is thereby prevented from recovering in this action. * *

17. "A minor assumes the ordinary risk of any employment which he undertakes, in so far as the risks are, or ought to have been, appreciated by him, whether the source of his knowledge is by information, observance, and experience, or by instructions that he had received. The fact that the plaintiff was a minor does not enlarge his rights, if you find that he understood, or should have understood, the danger. This is to be taken in connection with what I have already instructed you in regard to the law applicable to a minor."

The instruction requested was properly refused. The instruction, so far as given by the court to the jury; fully and clearly states the law upon the subject, and was sufficient to enlighten the jury on the question, and enable them to correctly apply the facts presented to the law governing the case, except that the instruction should have also made it clear that it was the duty of the master to have instructed the plaintiff as to the dangers incident to his employment, etc., but it is obvious this omission is one concerning which the plaintiff alone would be in position to complain. It is fully and clearly established, under the repeated and uniform holdings of this court, that where the employee is immature in

years, and is inexperienced in the work in which he is employed, that feature becomes of importance in determining the issue as to whether contributory negligence may be imputed to him.

18. It is too well settled to justify any further elucidation thereof that, under such circumstances, it becomes the employer's duty to give the minor sufficient notice of the dangers incident to and attending his employment, which was not done in the case under consideration. For a full discussion of the subject enunciating the above rule, see Barrows, Negligence, 119; *Gibson v. Oregon S. L. Ry. Co.*, 23 Or. 493, 496 (32 Pac. 295); *Westman v. Wind River Lum. Co.*, 50 Or. 137, 141 (91 Pac. 478); *Russell v. Oregon R. & N. Co.*, 54 Or. 128 (102 Pac. 619).

19. The next question presented, and the one more difficult of solution, concerns the submission to the jury of the question whether the company's failure to provide rules for the guidance of its employees might be taken into consideration by the jury as negligence on its part. In *Wagner v. Portland*, 40 Or. 389, 405 (60 Pac. 985; 67 Pac. 305) the law upon this subject is clearly and concisely stated by Mr. Justice WOLVERTON thus: "The question whether the defendant was at fault in omitting to adopt suitable rules is not one for the jury, unless there is something in the testimony from which the inference may be drawn that it was practicable to have provided against the occurrence of the accident complained of by such a rule. The court say in *Texas & N. O. Co. v. Echols*, 87 Tex. 339, 343 (27 S. W. 60; 28 S. W. 517): 'Whether or not the evidence is sufficient to show a case in which the duty to make rules rested upon the defendant is a question of law for the court. If the facts raised that issue, it should have been submitted to the jury; otherwise it should not.' It may occur that the necessity and propriety of making and promulgating rules in a given case are so obvious as

to make the matter one of common experience and knowledge. Such a condition would warrant a submission of the question as to whether the defendant was at fault in omitting its duty in this regard to the jury without evidence."

20. The question then arises; Has plaintiff brought himself within the rule as thus announced? It appears from the testimony that after plaintiff had, three times in rapid succession, signaled to the engineer to stop the cars, he jumped therefrom, and immediately proceeded to descend by climbing down the framework of the trestle, after which the cars ran about 45 feet, when the broken car, carrying with it the other cars and cable attached thereto, went over the trestle, resulting in the injury complained of. It is also apparent that the company could let the cars down by steam power, which was used for heavy loads only, and could thereby have let them run more slowly, and by that method have retained greater control over them than by the use of the brake for that purpose. It would seem that, owing to the difficulties reasonably to be expected in lowering damaged cars to the repair shops, and dangers necessarily incident thereto, the company might by rules have provided a method of inspection more conducive to the safety of its employees than the one in use, including therein ample notice to coemployees of any defects discovered, and some manner of lowering defective cars with greater caution, and with a corresponding degree of safety. The evidence discloses that the work involved many complications, and the risk incurred in plaintiff's occupation to be hazardous, possibly not to such an extent as to justify the court, as a matter of law, in holding the adoption of rules necessary, but such conditions as reasonable minds might draw different inferences therefrom as to the necessity therefor, making the question as to whether such rules were reasonably necessary one for the jury. *Bailey's Master's Liability, 72-75; Hartwig*

v. *N. P. L. Co.*, 19 Or. 522 (25 Pac. 358); *Knahtla v. O. S. L. R. Co.*, 21 Or. 136, 143 (27 Pac. 91); *Mast v. Kern*, 34 Or. 247, 251 (54 Pac. 950; 75 Am. St. Rep. 580); *Rush v. Oregon Power Co.*, 51 Or. 519 (95 Pac. 193); *Crawford v. United Rys. & Elec. Co.*, 101 Md. 402 (61 Atl. 287, 291; 70 L. R. A. 489); *McGovern v. Central V. R. Co.*, 123 N. Y. 280, 289 (25 N. E. 373).

21. It is argued in this connection, however, that plaintiff assumed the risks incident to his employment, which included the taking of the defective and injured cars to the shop, and that he knew the flange was broken, and that the cotter pin was missing, constituting such defects that the danger thereto was apparent to anyone, including one of his age and experience, by reason of which it is argued that plaintiff's negligence in not placing a pin in the axle to hold the wheel was the proximate cause of the injury. But plaintiff testifies that he had no knowledge of the broken flange which the evidence discloses was upon the wheel where the linch pin was missing, and it further appears that it was nothing unusual to run the cars with the cotter pin missing; the cars in such cases being held upon the track with a reasonable degree of safety by the flange of the wheel. The wheel probably came off as a result of the broken flange, of which plaintiff, as stated, had no knowledge. It is also clear that the car was not sent to the shop on account of the missing pin, but because of the broken flange. Under the showing made these were question for the jury, and the cause was properly submitted to them.

22. It is also maintained that the court erred in not instructing the jury that the measure of damages in these cases is the difference between the earning capacity of the injured party before and after the accident, and not by what has been actually earned since the injury was received. The court instructed extensively on this subject, and, so far as given, correctly stated the law

(*Ridings v. Marion County*, 50 Or. 30: 91 Pac. 22). and, while the instruction to the effect suggested, if it had been added thereto, would probably have conveyed to the jury a more comprehensive knowledge of the law applicable, the bill of exceptions does not disclose that an instruction bearing on this phase of the case was requested, in the absence of which defendant cannot on appeal urge its omission as reversible error. *Beadle v. Paine*, 46 Or. 424 (80 Pac. 903).

23. Concerning the last point presented, it is urged that it was error to enter judgment against one of the defendants. In this connection the instructions given, as well as those tendered but refused, together with the conduct of the trial throughout, treats the Beaver Hill Coal Company as the defendant against which the negligence is charged and the damages claimed, and no objection was interposed at the trial, nor until heard in this court, as to the procedure in that respect. The judgment against the Beaver Hill Coal Company amounted to a dismissal as to Daniel Maher, and appellant is in no way prejudiced thereby. Sections 180, 181, B. & C. Comp.; Cooley, Torts, 145; *Krebs Hop Co. v. Taylor*, 52 Or. 627 (98 Pac. 494); *Davis v. Taylor*, 41 Ill. 405; *Illinois C. R. Co. v. Foulks*, 191 Ill. 57, 71 (60 N. E. 890).

Finding no error in the record prejudicial to appellant, the judgment of the circuit court is affirmed.

AFFIRMED.

Argued May 5, decided July 18, 1909.

ROESCH v. HENRY.

[108 Pac. 439.]

INTOXICATING LIQUORS—LOCAL OPTION—ELECTIONS—APPLICATION AND PROCEEDINGS THEREON—"LEGAL VOTERS."

1. Laws 1906, p. 41, provides that whenever a petition therefor, signed by not less than 10 per cent of the "registered voters" of any county, shall be filed with the county clerk, the county court shall order an election to determine whether the sale of intoxicating liquors shall be prohibited in such

county, and that, in determining whether any such petition contains the requisite percentage of "legal voters," said percentage shall be based on the total vote in such county for Justice of the Supreme Court at the last preceding general election, provided that in no event shall more than five hundred petitioners who are legal voters be necessary upon any such petition, and "the county clerk shall, upon receipt of such petition, immediately file the same, and shall compare the signatures of the electors signing the same with their signatures on the registration books of the election then pending, or, if none pending, with the signatures on the registration books and blanks on file in his office for the preceding general election." *Held*, that the phrase "legal voters" as used in the law is a synonym for "registered voters," and that no qualified elector is a competent petitioner for a local option election unless his signature appears on the registration books, the privilege of signing such a petition not being a right of franchise in which all the electors enumerated in Section 2, Article II, Constitution of Oregon, may participate, but whether there is a sufficient number of signers is to be determined by comparing such number with the number who last voted for justice, and the number of registered voters in a district is only important for the purpose of comparing the signatures of the petitioners with the signatures on the registration books.

INTOXICATING LIQUORS — LOCAL OPTION — ELECTION — ORDER — "LEGAL VOTERS" — "REGISTERED VOTERS."

2. A county court, in considering a petition for an election to determine whether the sale of intoxicating liquors shall be prohibited in the county, recited in their order that the matter came before them on the petition of "legal voters" of the county, and that, "it appearing to the court that said petition is signed by more than 10 per cent of the qualified electors, * * and has been properly compared and certified to be genuine and is in all respects in due form of law, it is therefore considered and ordered by the court that the prayer of said petition be and the same is hereby granted." *Held*, that the terms "legal voters" and "qualified electors" as used in the order are not equivalent to "registered voters" as used in Laws 1906, p. 41, providing for the calling of an election to determine whether the sale of intoxicating liquors shall be prohibited on petition of 10 per cent of the "registered voters."

INTOXICATING LIQUORS — LOCAL OPTION — ELECTIONS — DECLARATION OF RESULT — INJUNCTION.

3. A complaint, in proceedings to restrain the county judge and commissioners of a county from declaring the result of an election to determine whether the sale of intoxicating liquors should be prohibited, alleged that the county court, in making the order for such election, acted without jurisdiction, in that the said petition did not contain the requisite number of names of persons who are legal voters in the county. The county court in calling the election acted under Laws 1906, p. 41, providing for calling such an election on a petition signed by not less than 10 per cent of the "registered voters" of a county, but that in no event shall it be necessary to secure more than five hundred petitioners "who are legal voters." *Held*, that the allegation of the complaint was insufficient to contest the validity of the order, because attention was not specifically called to the class of persons who were qualified petitioners.

INTOXICATING LIQUORS — LOCAL OPTION — NOTICE OF ELECTION.

4. A notice of an election, to be held to determine whether the sale of intoxicating liquors should be prohibited in the county which follows the form prescribed by the statute (Laws 1906, p. 46, § 7), is sufficient, although the signature of the county clerk was printed and his official seal was not attached.

INTOXICATING LIQUORS—LOCAL OPTION—NOTICE OF ELECTION—WHO MAY POST.

5. Laws 1905, p. 45, § 7, makes it the duty of the sheriff, before the holding of any local option election, to post the notices which have been delivered to him by the county clerk. The notices prescribed by said Section 7 are not to be issued in the name of the State, nor directed to any person. *Held*, that the election was not affected by the posting of the notices by private persons.

INTOXICATING LIQUORS—LOCAL OPTION—NOTICE OF ELECTION.

6. Laws 1905, p. 44, § 4, provides that no person shall be qualified to vote at any local option election who would not be qualified to vote at that election for precinct and county officers in that precinct in which he offers to vote, and Section 2776, B. & O. Comp., provides that all qualified electors shall vote in the election precinct in the county where they may reside for county officers. In a local option election in a county, there were 1,905 votes cast in favor of prohibition, and 1,806 against it. In a precinct in which the notices of election were not posted as prescribed by law, the number of registered voters were thirty-eight, and at the election therein nine votes were cast in favor of prohibition and twenty-two cast against it. The greatest number of votes cast for any officer in the county at the election in which the question of local option was passed upon was 3,437, or 352 more than were registered. *Held*, that the failure to properly post the notices in that precinct did not invalidate the election, as the number of votes in that precinct could not affect the general result.

JURISDICTION—LOCAL OPTION—NOTICE OF ELECTION.

7. Jurisdiction comes, in the first instance, from the petition and order of the county court submitting the question of prohibition to a vote, and not from the notice, which is a mere incident, and therefore a substantial compliance with the statute is all that is required.

(From opinion of Mr. Justice McBRIDE.)

From Union: THOMAS H. CRAWFORD, Judge.

This suit was commenced in the circuit court of Union County, by Julius Roesch against J. C. Henry, county judge, J. M. Selder and Ben Brown, as county commissioners, constituting the county court for Union County, Oregon, for the transaction of county business, to restrain them, as such officers, from declaring the result of a local option election. From a decree dismissing the suit, plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the names of *Mr. B. F. Wilson* and *Mr. Charles H. Finn*, with an oral argument by *Mr. Finn*.

For respondent there was a brief over the names of *Mr. Francis S. Ivanhoe*, district attorney, with oral arguments by *Mr. Ivanhoe* and *Mr. Andrew M. Crawford*, Attorney General.

Opinion by MR. CHIEF JUSTICE MOORE.

This is an appeal by Julius Roesch, a brewer at La Grande, from a decree dismissing a suit instituted to restrain the county judge and commissioners of Union County from declaring the result of an election, held therein June 1, 1908, for the purpose of determining whether or not the sale of intoxicating liquors, as a beverage, should be prohibited, and to enjoin them from interdicting such sales. It is contended by plaintiff's counsel that the requirements of the local option liquor law were not complied with in the following particulars:

(1) The sufficiency of the petition initiating the proceedings was not determined by defendants when the election was ordered; (2) the notices of election were insufficient; (3) they were not posted as required by law. Based on these alleged defects, it is insisted that in dismissing the suit, and in failing to grant the relief invoked, errors were committed. We shall consider these questions in the order stated.

1. The complaint sets forth a copy of the authorization of the election as follows:

"Now at this time, to wit, on the second day of April, A. D. 1908, this matter came before the court upon the petition of W. A. Worstel and others, legal voters of Union County, Oregon, praying that an election be held on Monday, the first day of June, A. D. 1908, the same being the time for the general election in Oregon for State and county officers, to determine whether or not the sale of intoxicating liquors shall be prohibited in said Union County, Oregon; and, it appearing to the court that said petition is signed by more than ten per cent of the qualified electors of Union County, as required by law, and has been properly compared and certified to be genuine, and is in all respects in due form of law, it is therefore considered and ordered by the court that the prayer of said petition be, and the same hereby is, granted. It is further ordered that an election within Union County as a whole be had on the first day of June, A. D. 1908, to determine whether the sale of intoxicating liquors shall be prohibited in such county. It is further

ordered that the county clerk of Union County, Oregon, be and he hereby is, ordered and directed to give the notice of said election in the manner and at the time required by law."

It is argued by plaintiff's counsel that the county court of Union County is a tribunal of limited power; that no presumptions or inferences can be indulged in aid of its record, which must speak for itself; that the order quoted fails to state the probative facts necessary to confer jurisdiction of the subject matter; and that hence its pretended authorization of the election was void.

In order to understand clearly the legal principle insisted upon, parts of the local option law (Laws 1905, p. 41) will be set forth to wit:

"Whenever a petition therefor signed by not less than ten per cent of the registered voters of any county in the State, or subdivision of any county, or precinct of a county, shall be filed with the county clerk of such county, in the manner in this act prescribed, the county court of such county shall order an election to be held at the time mentioned in such petition, and in the entire district mentioned in such petition, to determine whether the sale of intoxicating liquors shall be prohibited in such county or subdivision of such county or in such precinct. In determining whether any such petition contains the requisite percentage of legal voters, said percentage shall be based on the total vote in such county or subdivision of county, or in such precinct, as the case may be, for Justice of the Supreme Court, at the last preceding election; *Provided*, that in no event shall more than five hundred petitioners, who are legal voters, be necessary upon any petition to require an election as herein provided: Section I. * * The county clerk shall, upon receipt of such petition, immediately file the same and shall thereupon compare the signatures of the electors signing the same with their signatures on the registration books of the election then pending, or if none pending, then with the signatures on the registration books and blanks on file in his office for the preceding general election." Section 6.

It will be noted that section 1 of the act requires the petitioners for a local option election to be "registered voters." The phrase "legal voters" is also used in that section, but it was evidently employed as a synonym for the term "registered voters," and to avoid a repetition thereof. The phrase "legal voters" also appears in section 5 of the act in the form prescribed for the petition. It will be remembered that the county clerk is directed to compare with their handwriting the petitioners' signatures as they appear on the registration books and blanks on file in his office. Construing these clauses in *pari materia*, it is manifest that no qualified elector or legal voter is a competent petitioner for a local option election unless his signature appears on the registration books of the election then pending; or, if no election be pending, then his signature must appear on the registration books and blanks of the preceding general election. The privilege of signing a petition, to initiate a local option election, is not a right of franchise in which all electors enumerated in the organic law (Section 2, Article II, Constitution of Oregon) can participate.

2. The act under consideration does not specify any particular day during which the signatures to the petition must be obtained, nor does it require that any notice should be given that a petition will be circulated. As only 10 per cent of the registered voters are necessary to cause a local option measure to be submitted for ratification or rejection, the signing of a petition for that purpose is not the expression of a choice in favor of, or opposed to, prohibiting the sale of intoxicating liquors; and hence the appending of signatures to the petition is not an election. This being so, the qualifications of the petitioners may be limited and restricted in such manner as may be prescribed. An examination of the order of the county court, hereinbefore quoted, will show that no express finding is made that the petition had been signed by "registered voters," though the order uses the phrases

"legal voters" and "qualified electors." These latter terms, however, are interchangeable; but, as an elector who has not registered is entitled to vote at an election, by making the required proof (Laws 1905, p. 259), it follows that the term "legal voters" or "qualified electors" is not equivalent to the phrase "registered voters."

3. That part of the complaint, as set forth in plaintiff's brief, which challenges the sufficiency of the authorization of the local option election, is as follows:

"That defendants, acting as the county court of Union County, Oregon, for the transaction of county business, in the making of the said order of April 2, 1908, ordering and directing that an election be held to determine whether or not the sale of intoxicating liquors should be prohibited in Union County as a whole, acted without jurisdiction, in that the said petition did not, and does not, contain the requisite number of names of persons who were legal voters of Union County, Oregon, as provided by law; and the said order of April 2, 1908, so submitting the said question to the legal voters of Union County at the said election, was and is null and void."

It will be seen from the language so quoted that the gist of the allegation is that the petition did not contain the requisite number of names of persons who were legal voters of Union County, Oregon. It is not charged in the complaint that the petition did not contain the necessary number of "registered voters." The answer alleges that the petition embraced the names of 542 legal voters, "as shown by the registration of voters of said county," and that the total number of votes cast therein for Justice of the Supreme Court at the last preceding general election was 3,030. This averment was denied in the reply; and, based upon such issue, the court, from the evidence submitted, found the facts as thus alleged in the answer.

If the question of local option were invariably submitted when a general election is held, it can readily be seen that the number of registered voters would possibly increase each day while the petition was being

circulated, so that it might be difficult to determine when the signatures of the required percentage of the registered voters had been secured. As the voters of a county must be registered in the even-numbered years (Section 2865, B. & C. Comp)—that is, during the year a general election is held (Section 14, Article II, Constitution of Oregon, as amended by laws 1909, p. 8)—and, as an election to determine whether or not the sale of intoxicating liquors shall be prohibited can occur only on the first Monday in June of any year (Laws 1905, p. 43, § 3), it can be perceived that, if a local option election is held in the odd-numbered year, the required number of petitioners, if less than 500, could be determined only from an inspection of the registration books and blanks of the preceding year. To avoid any uncertainty that might arise from the increasing registration of voters when a local option election is held at the time of a general election, section 1 of the local option law was evidently so framed as to make the vote cast for Justice of the Supreme Court at the last preceding general election equivalent to the number of voters who have been registered. Therefore, in all local option elections the number of registered voters in a given district at any particular time is immaterial, except for the purpose of comparing the signature of the petitioners with their signatures on the registration books and blanks, since the total vote cast in a county, or in a subdivision thereof, or in a precinct therein, as the case may be, for Justice of the Supreme Court at the last preceding general election constantly forms the basis for computation in determining whether or not a petition contains the requisite number of signatures, except where 500 registered petitioners are secured.

In the case at bar, if the order authorizing the election had expressly stated that the petition contained the names of not less than 500 registered voters of Union County, the finding would have been sufficient. So, too, in any

case, if the petition was not signed by 500 registered voters, the order of the county court could state the number of such registered voters whose names were appended to the petition, and give the total vote cast for Justice of the Supreme Court at the last preceding general election in the county, or in a subdivision thereof, or in a precinct therein, as the case might be; and such conclusions of fact would be ample. It would be easy to determine, from such recital in the order, whether or not the number of petitioners who were registered voters sustained the proper ratio to the total vote so cast for a Justice of the Supreme Court, without deducing the legal conclusion that the petition was signed by not less than 10 per cent of the registered voters of the specified territory. It will be remembered that the part of the complaint hereinbefore quoted does not aver that the order of the county court authorizing the local option election is void, in that the petition did not contain the requisite number of names of persons who were "registered" voters of Union County. The answer denies the allegations of the complaint, and avers that the petition contained the names of 542 legal voters, "as shown by the registration of voters of said county." No demurrer was interposed to the answer, and the averments of new matter therein were denied in the reply.

The allegation of the complaint is insufficient to contest the validity of the order of the county court, because attention is not thereby specifically called to the class of persons who are qualified petitioners. The answer distinctly alleges that the petition contained the requisite number of "registered voters"; and, as such averment was not challenged by demurrer, it will be assumed, without deciding the question, that the order of the county court authorizing the local option election was subject to review. Based on the issue made by the reply, the original petition for the local option election, having been identified, was offered in evidence, and has been

sent up to this court. Ed Wright, the deputy county clerk of Union County, testified that the names subscribed to the local option petition were compared with the registration books of that county for the year 1908, and it was found that 542 of the petitioners had been registered and were legal voters. This witness also identified an abstract of the returns of the votes cast in the several precincts of that county at the last preceding general election, and stated that the total vote so given for Justice of the Supreme Court was 3,030. The court made findings of fact according to such testimony, and conformable with the averments of the answer.

We conclude that, if the order complained of was defective because of the insufficiency of the findings, the imperfection was not particularly pointed out by the averments of the complaint; that the evidence submitted at the trial herein on the issue made by the answer and reply justified the finding made by the court, and that such conclusion of fact demonstrates that the county court properly ordered an election to be held to determine whether or not the sale of intoxicating liquors should be prohibited in the entire county.

4. It is maintained by plaintiff's counsel that, because the notices of the local option election did not have the name of the county clerk written thereon, nor his signature attested by the seal of the county court, the printing of his name on the notices was ineffectual and did not impart that information which they were designed to supply. One of the notices, which, from its appearance, was posted, having been identified, was received in evidence, and has been sent up with the transcript. This notice complied with the form prescribed by the local option law (section 7), which does not direct that such notices shall be signed by the county clerk or authenticated by a seal. In *Herrick v. Morrill*, 37 Minn. 250 (33 N. W. 849; 5 Am. St. Rep. 841), in determining the sufficiency of process, it was held that any signature,

whether written, printed, or lithographed, which the party issuing the summons might adopt as his own, was sufficient. It has been ruled by this court that, where an officer adopts a printed signature as his own, such use is adequate for the purpose for which it was employed. *State v. Belding*, 43 Or. 95 (71 Pac. 330); *State v. Guglielmo*, 46 Or. 250 (79 Pac. 577; 80 Pac. 103; 69 L. R. A. 466). The notices were, in our opinion, sufficient.

5. It is argued by plaintiff's counsel that because some of the notices of election were posted by persons who were not deputies of the sheriff, the advertisement so given was unavailing. The local option law imposes on the sheriff the duty to post five election notices in each precinct in which a vote upon the question of prohibition is to be taken, and thereupon briefly to enter of record his compliance with such requirements. Laws 1905, p. 45, § 7. The transcript herein shows that the required number of notices were posted in 10 of the 22 precincts of Union County by the sheriff thereof, as evidenced by his several certificates showing when and where each notice was put up. In the remaining precincts, however, the notices were posted by persons who were not specially appointed by written authority, but who, respectively, made similar proof by affidavits. The election notice prescribed by section 7 of the local option law is not issued in the name of the State, nor is it directed to any person. The posting of the notice could as well be done by a private person as by a public officer, except that the latter only could be compelled to perform such service, and for any failure in that respect he might, by proper enactment, be held responsible for a breach of the duty. The sheriff has been designated by the statute as the officer to post local option election notices. If, in the performance of that duty, he employs persons whom he does not, by special written appointment, authorize to perform such service (Section 1012, B. & C. Comp.), and the persons so selected discharge that duty

properly, the only credit he usually receives is the satisfaction of having performed an obligation which the law imposed. If his agents fail, however, to post the notices properly, in consequence of which the will of a majority of the people, expressed at the polls, is defeated, the sheriff must necessarily be subjected to the just censure which an outraged public entertains. The self-approbation for an obligation faithfully performed, and the blame of the community for a service neglected, are generally sufficient inducements to guarantee the performance of a public duty enjoined. These propelling incentives support the conclusion that a sheriff may select as his agents persons whom he does not specially appoint as deputies, and that they may legally post local option election notices. Thus in *Jordon v. Hayne*, 36 Iowa 9, 16, a tax in aid of the construction of a railroad having been voted at a special election held for that purpose, the regularity of the proceedings was challenged by certiorari, on the ground, *inter alia*, that the notices of election were not posted by the proper person. In deciding the case it is said: "The return shows that the notices of the election required by law were given. The fact that they were posted by the clerk instead of the trustees does not affect their sufficiency. The trustees in this matter acted through the clerk as their agent." To the same effect see *Battis v. Price*, 2 Pears. (Pa.) 456, 459; *Phillips v. Town of Albany*, 28 Wis. 340, 356.

The plaintiff's counsel, invoking the rule announced in the case of *Guernsey v. McHalcy*, 52 Or. 555 (98 Pac. 158), contend that as one of the sheriff's agents posted only three election notices in Kamela precinct, such failure strictly to comply with the requirements of the local option law invalidated the election in the entire county. The transcript herein shows that in Union County, at the election specified, 1,995 votes were cast in favor of prohibition, and 1,305 against it, thus giving a majority in support of the measure of 690, making the total vote upon

the question 3,300, while the number of legal voters who registered prior to the election was only 3,085, and the pleadings admit that the greatest number of votes cast for any officer was 3,437. In the precinct in which only three election notices were posted the number of registered voters was 38, and at the election therein nine votes were cast in favor of prohibition and 22 against it. The case to which attention is called was a suit to enjoin the making of an order prohibiting the sale of intoxicating liquors in Grant County, pursuant to an election held therein June 1, 1908. As stated in the opinion, it appeared that in one precinct no election notices were posted. In another precinct only three notices were put up, and were so posted only eight days before election; and in two other precincts five notices were put up in each, ten and eleven days, respectively, before election. Based upon such showing, it was held that the failure of the sheriff strictly to comply with the requirements of the provision of the local option law rendered the election nugatory. In reaching that conclusion Mr. Chief Justice BEAN observes: "It is said that no substantial injury resulted in the case under consideration from the failure to post the notices as required by law, but this can never be known. There were, in fact, less votes cast on the question of prohibition than for some of the county officers, and there is no means of determining how many voters did not attend the election who would have done so if they had been advised that such question was to be submitted." We have re-examined the record in the case of *Guernsey v. McHaley*, *supra*, on file in this court, and discover that at the election, in the entire county 695 votes were cast in favor of prohibition and 673 against it, making a majority of only 22 in support of the measure. It was stipulated by the parties to that suit that 112 qualified electors of Grant County voted for county officers who did not vote in favor of or against prohibiting the sale of intoxicating liquors. It

can thus be seen that if 22 of such number who did not express at the polls an opinion upon the question of prohibition had voted against the measure, it would have been defeated. It will be remembered that no notices were put up in one precinct in Grant County, and that in three other precincts therein the notices were posted in advance only eight, ten and eleven days, respectively, when the local option law requires that such notices shall be posted at least twelve days prior to an election. Laws 1905, p. 45, § 7.

In the case at bar it will be borne in mind that the majority in favor of prohibition was 690; that the entire vote cast for and against prohibition was 3,300, which number exceeded by 215 the qualified electors who had registered, and that the greatest number of votes polled for any officer was 3,437, or 137 more than were cast on the question of prohibiting the sale of intoxicating liquors. If the electors who expressed at the polls no choice in relation to the matter under consideration, had voted against prohibition, the measure would then have had a majority of 493. The local option law contains a clause as follows:

"No person shall be qualified to vote at any election hereunder who would not be qualified to vote at that election for precinct and county officers in the precinct in which he offers to vote." Laws 1905, p. 44, § 4. "All qualified electors shall vote in the election precinct in the county where they may reside for county officers." Section 2776, B. & C. Comp.

In the case at bar, though the election involved the entire county, each precinct therein was considered as a unit, and regarded as an integral part of the whole. The notice required to be posted in each precinct was evidently designed to inform the legal voters of such precinct that at an election which was pending therein the question of prohibition would be determined. If such notices were read by qualified electors who resided

in other precincts, the information thus acquired would undoubtedly apprise them of the question thus to be decided. It is quite evident that the posting of notices in each precinct was designed to advise the legal voters of only that precinct that an election would be held therein, and not to inform the qualified electors of some other precinct. Hence a failure properly to post the required number of election notices for the prescribed time in a given precinct ought not to affect the vote in the entire county, unless the number of votes in such precinct would probably affect the general result. Where it appears, as in *Guernsey v. McHaley*, 52 Or. 555 (98 Pac. 158), that the irregularities are of such character and magnitude that they might have affected the outcome, the election ought to be set aside, but if no such result is reasonably probable, the election ought not to be disturbed. Thus, as was said by the Supreme Court of Washington, in *State v. Doherty*, 16 Wash. 382 (47 Pac. 958; 58 Am. St. Rep. 39, 43): "The vital and essential question in all cases is whether the want of the statutory notice has resulted in depriving sufficient of the electors of the opportunity to exercise their franchise to change the result of the election." In a note to section 197 of Dillon's *Municipal Corporations* (3 ed.) the author remarks:

"It is now a canon of election law that an election is not to be set aside for a mere informality or irregularity which cannot be said in any manner to have affected the result of the election."

In *Wheat v. Smith*, 50 Ark. 266 (7 S. W. 161, 165), Mr. Chief Justice COCKRILL, in speaking of a special election, observes: "The question in such cases is whether the want of the statutory notice has resulted in depriving sufficient of the electors of the opportunity to exercise their franchise to change the result of the election. * * When the election is legally ordered, and the electors are actually apprised of the time and place appointed

for holding it, the misfeasance or nonfeasance of the officer upon whom the statute devolves the duty of giving the election notices cannot deprive the electors of the right to express their will through their ballots." The greatest number of votes cast for any officer in Union County at the election held June 1, 1908, was 3,437, or 352 more than were registered. It is impossible to say with any degree of accuracy how many legal voters, who were not registered, did not attend the election, but it is fair to assume that the number of registered voters is a fair index of the qualified electors of a precinct; and this being so, no system of calculation can so change a registration of 38 voters as to overcome a majority of 690 votes in favor of prohibition. We think the rule of law should be that no precinct was affected by the want of sufficient notice but Kamela, and that such defect could not by any possibility have changed the result of the election if the required number of notices had been posted.

Believing that no error was committed as alleged, the decree is affirmed.

AFFIRMED.

MR. JUSTICE MCBRIDE delivered the following opinion.

I concur in the conclusion arrived at by the Chief Justice, but not entirely upon the same grounds. This case rests upon one proposition, namely, whether the posting of a notice of a special election, in the manner required by law, is a jurisdictional matter, requiring the same strictness of compliance as a public road notice or whether a substantial compliance will be sufficient. I do not suppose it will make any great difference whether thirsty citizens of Union County get their supplies at licensed saloons, as they have been wont to do for these many years, or are compelled to adopt the inconvenient methods frequently practiced in the so-called "dry counties," but the principle involved here is far-reaching. Local option elections are not the only special elections in which citizens are likely to be required to participate. Special elections to fill

vacancies in office may be called by proclamation of the Governor, and I hesitate to adopt a rule which will say that the citizens of a State or county, or even a precinct, may be disfranchised by the failure of a careless or fraudulent officer to post a single notice. Suppose a special election for the entire State should be called upon some measure or office. If the failure to post a notice in Kamela precinct disfranchises more than 3,000 voters in Union County, then a like failure in the smallest precinct in the State would disfranchise every voter in the commonwealth. There are decisions taking both views of this question, but I think a fair view, and that most consonant with justice, is that unless there is some probability that a trifling failure apparently negligible has, in fact, changed the result, or there is some reasonable ground for doubt on that question, it ought not to avoid the election even in the precinct where the mistake occurred. I believe the statute so far directory that a substantial compliance is all that is necessary, and that jurisdiction comes in the first instance from the petition and order of the court submitting the question of prohibition to a vote, and not from the notice, which is a mere incident.

Speaking of statutes similar to the one under consideration a learned author says:

"It may, perhaps, be found generally correct to say that nullification is the natural and usual consequence of disobedience, but the question is in the main governed by considerations of convenience and justice; and, when that result would involve general inconvenience or injustice to innocent persons, or advantage to those guilty of the neglect without promoting the real aim and object of the enactment, such an intention is not to be attributed to the legislature. * * When a public duty is imposed, and the statute requires that it shall be performed in a certain manner, or within a certain time, or under other specified conditions, such prescriptions may well be regarded as directory only, when injustice or inconvenience to others who have no control over those

exercising the duty would result if such requirements were essential or imperative." Maxwell, Interp. Stat. 556, 557.

Every word above cited applies forcibly to the case at bar. The statute imposed a duty on the sheriff, to wit, to post five notices in every precinct in Union County. He failed in that duty in one precinct. Now, shall the law be so construed as to punish 3,000 innocent voters for his malfeasance, or shall they be allowed to have their votes counted, and the consequences of his neglect be visited upon the sheriff? The latter course seems to me to be the one justice and sound law dictate in this case.

MR. JUSTICE SLATER delivered the following dissenting opinion.

I am unable to agree with the conclusion reached by the learned Chief Justice as to the effect of the failure of the sheriff to post the required number of notices in Kamela precinct. The law requires that five notices be posted in each precinct at least twelve days before the election. In this instance but three were posted in Kamela precinct, and it is held that posting of notices in each precinct was designed to advise the voters of only that precinct that an election would be held therein, and not to inform the voters of some other precinct. Hence the conclusion that a failure properly to post the required number of election notices in a given precinct ought not to affect the vote in the entire county, unless the number of votes in such precinct would probably affect the general result. And because the majority for prohibition in the entire county was relatively large as compared with the total registered vote in Kamela precinct, it is argued that it is not reasonably probable that the absence of notice affected the general result. This line of reasoning treats the failure to give notice merely as an irregularity which would render the election voidable if substantial injury resulted, and

not *per se* void. The conclusion reached in the main opinion is opposed to the principle of law announced by this court in *Marsden v. Harlocker*, 48 Or. 90 (85 Pac. 328; 120 Am. St. Rep. 786), and in *Guernsey v. McHaley*, 52 Or. 555 (98 Pac. 158). In the former case it was held that in special elections a compliance with all the statutory requirements in respect to the performance of the conditions precedent is mandatory in order to validate the election. The latter case followed and expressly approved of that declaration, citing *ex parte Conley* (Tex. Cr. App.) 75 S. W. 301, as supporting such pronouncement of the law. This is a Texas case which arose under the local option law of that state, from which the law of this State was borrowed. Mr. Chief Justice BEAN, who wrote the opinion in *Guernsey v. McHaley*, understood the Texas court to hold "that an election under the local option law was void when it appeared that all but one of the notices had been posted the required length of time, and the election had been fair, and no actual injury resulted on account of the failure to give the requisite notice, for the reason that the lawmaking power had seen fit to provide the prerequisites of a legal vote, and the court could not disregard or dispense with any of them." An examination of the opinion in that case shows this interpretation of it not only to be correct, but the conclusion reached is emphasized by that court in this language: "If the failure to post notices * * renders the election void, then the fact that it may have been fair, and that no actual injury resulted in the failure to comply with these prerequisites of the law, cannot render the law (election) valid." If the requirements of the law in respect to the making of an order by the county court and the posting of notices by the sheriff are mandatory, then the strict performance of them is essential to the validity of the election, and the question of material or substantial injury flowing from the

omission of either is not material. It is only when the thing to be done is merely directory, and the omission thereof renders what follows voidable and not void, that the question of substantial injury is material to be considered. It is upon this distinction that the conflict in the cases has arisen. Those holding to the doctrine that the provisions of statutes requiring a particular form of notice for the holding of special elections are mandatory and must be strictly followed have been cited and followed in *Marsden v. Harlocker*, and *Guernsey v. McHaley*, and some of those holding to the opposite opinion are now cited in support of the majority opinion in this case. In *State v. Doherty*, 16 Wash. 382 (47 Pac. 958: 58 Am. St. Rep. 39, 43), it was held that the particular form and manner pointed out by statute for giving notice is not essential, following the previous holding of that court in *Seymour v. Tacoma*, 6 Wash. 427 (33 Pac. 1059), to the effect that the formalities of giving notice, although prescribed by statute, are merely directory, unless there is a declaration that if the formalities are not observed the election shall be void. In *Wheat v. Smith*, 50 Ark. 266 (7 S. W. 161, 165), it is said, immediately preceding the excerpt quoted therefrom in the majority opinion, that "the particular form and manner pointed out by the statute for the giving of notice is not essential;" that is, it is merely directory. I can agree with Mr. Dillon's quoted remark that it is now a canon of election law that an election is not to be set aside for a mere informality or irregularity which cannot be said in any manner to have affected the result of the election"—but the question upon which we differ is whether the failure to give notice is an "informality or irregularity." That author, in the text just above the footnote from which the excerpt is taken, says: "If the time be not defined by statute, and is to be fixed by notice, the notice required is imperative." Believing that the notice required by the statute in this case was

essential, and that the failure to post the notices rendered the election void as to the particular matter in question, the decree should be reversed, and an order of injunction issued.

MR. JUSTICE KING concurs in this dissent.

Argued March 24, decided June 8, motion to retax costs denied July 20, 1900.

McGEE v. BECKLEY.

[102 Pac. 308; 103 Pac. 61.]

TRIAL—INSTRUCTIONS IGNORING ISSUES.

1. The defendant, in an action on an express contract to pay rent, denied the contract, and alleged as a defense that a trustee in bankruptcy took possession of the premises under a decree against the plaintiff and leased them to defendant for a stipulated rental, which was the reasonable rental value of the premises, and paid into court the amount admitted to be due. Plaintiff's reply denied the new matter alleged in the answer, and averred that the decree had been reversed and the suit in which it was given dismissed. *Held*, that the issue made by the answer and reply was proper, and it was error to give an instruction that plaintiff's right to recover the reasonable rental value was not involved in the case.

COSTS ON APPEAL—EXPENSES OF TRANSCRIBING TESTIMONY.

2. The costs of transcribing the stenographer's notes of the testimony must be taxed in the lower court, as required by Section 906, B. & C. Comp., and are not taxable as part of the disbursements on appeal.

From Douglas: JAMES W. HAMILTON, Judge.

Statement by MR. CHIEF JUSTICE MOORE.

This is an action by J. T. McGee against J. W. Beckley to recover a balance alleged to be due as rent. It is stated in the complaint:

That on June 19, 1906, the plaintiff leased to the defendant a house and a barn, for the use of which the latter agreed to pay a monthly rental of \$7.50 and \$12.50, respectively; that the defendant used the barn 14 months and 21 days, and occupied the house 15 months and 11 days, the total rent thereof being \$298.86, no part of which has been paid except \$144.60, thus leaving due \$154.26.

The answer denied each averment of the complaint, and for a separate defense alleged: That on April 17, 1906, in a suit wherein C. I. Leavengood, as trustee

of the bankrupt estate of P. T. McGee, was plaintiff, and the plaintiff herein and others were defendants, it was decreed that the bankrupt was the owner of the land described in the complaint, which premises were ordered to be sold to satisfy the claims against such estate; that, pursuant to the decree, the trustee took possession of such land, and on June 19, 1906, leased the barn and house at \$10 and \$5 a month, respectively, to the defendant herein, who used the barn from that time and occupied the house from July 15, 1906, paying the stipulated rent till July 1, 1907, to the trustee, who gave the same to the plaintiff, McGee; that \$15 a month is the reasonable rental value of both buildings during all the time the defendant had possession thereof; that on September 1, 1907, he surrendered to the plaintiff the house, and nine days thereafter the barn; that about October 2, 1907, the defendant offered to pay the plaintiff, as rent for the buildings from July 1, 1907, to the time they were so surrendered, the sum of \$62.50, which, before the commencement of this action, was tendered to the plaintiff, but refused by him, whereupon that sum was deposited for him with the clerk of the trial court.

The reply denied the allegations of new matter in the answer, and averred that an appeal was taken from the decree referred to and an undertaking given which stayed the proceedings, in consequence of which no sale of the land was made, and that on August 20, 1907, the decree was reversed, and the suit in which it was given was dismissed. The case at bar was tried, resulting in a verdict for the defendant, and judgment having been rendered thereon, dismissing the action, the plaintiff appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Commodore S. Jackson*.

For respondent there was a brief over the names of *Messrs. Fullerton & Orcutt*, with an oral argument by *Mr. James C. Fullerton*.

Opinion by MR. CHIEF JUSTICE MOORE.

An exception having been taken to the following instruction, it is contended by plaintiff's counsel that an error was committed in giving it, to-wit:

"Now it is claimed that there is evidence in this case tending to show that there was an agreement entered into as stated in the complaint, and that the defendant entered into possession under this agreement, and it is claimed on behalf of the defendant that he went into possession of the premises, but without any agreement as to the amount to be paid as rental, and that his occupancy was during a time that there was litigation pending relative to the ownership of this identical property, the possession of which he took, and it is claimed that there is some evidence which tends to show that he did not enter into the contract as claimed by the plaintiff there, being governed to some extent by the fact of the uncertainty of the title to the property, being as he claimed in litigation. Now you are the judges of the facts in the case, and if you should find from the evidence (it should appear from the evidence) that the defendant entered into possession of this property (rented it from the plaintiff), but that there was no express agreement as to the amount which he should pay, then the plaintiff would not be entitled to recover in this action. The law in such a case would be that the plaintiff would be entitled to recover what would be the reasonable value, and that is not a question in this case."

From an examination of the pleadings, the substance of which is hereinbefore set forth, it will be seen that the cause of action stated in the complaint is based upon an express agreement, but that the answer denied that any such contract had been consummated by the parties. The title to the land on which the house and barn stood was challenged; but, by the dismissal of the suit, the controversy was determined in McGee's favor. *Leavengood v. McGee*, 50 Or. 233 (91 Pac. 453). It was thus impliedly established that Leavengood had no authority to lease the buildings, and, in view of such conclusion, it was evidently alleged in the answer that \$15 a month, the sum which the defendant asserts he had agreed to

pay the trustee in bankruptcy, was the reasonable rental value of the use of the house and the barn during all the time he had possession thereof. Such averment was made in the answer in order to reduce the amount demanded in the complaint, by proving, if possible, that no express contract for the leasing of the premises had been entered into by the parties, and that, though the defendant had used and occupied the premises without authority, the reasonable rental value of the buildings did not exceed \$15 a month. The issue thus tendered was proper, and, in the light of the facts, constituted the only valid defense which could have been interposed.

If, from the evidence introduced at the trial, the jury were satisfied that the plaintiff's theory of the case had been established, a verdict should have been returned in his favor for \$154.26. If, however, they were convinced that the testimony supported the defendant's hypothesis, they should also have found in favor of the plaintiff in the sum of \$62.50, as admitted in the answer, and should have further found whether or not a proper tender had been made, so as to enable the court to determine who was entitled to recover the costs and disbursements. Section 573, B. & C. Comp. The jury might have found that no express contract for the leasing of the buildings had been consummated by the parties, and that the reasonable rental value was greater than alleged in the answer. Such a conclusion would have entitled the plaintiff to the costs and disbursements. *Jacobs v. Oren*, 30 Or. 593 (48 Pac. 431). Instead of returning either of the verdicts indicated, the jury found for the defendant, and a judgment dismissing the action was rendered against the plaintiff, notwithstanding the pleadings admitted that \$62.50 was due him, and that such sum was on deposit for him with the clerk of the trial court.

Under the issue made by the averments of new matter in the answer and by the denial thereof in reply, the

plaintiff was entitled to the reasonable rental value of the buildings during all the time the defendant had possession thereof. This question was directly involved in the case at bar.

In giving the instruction quoted, an error was committed necessitating a reversal of the judgment, which is ordered.

REVERSED.

Decided July 20, 1909.

ON MOTION TO RETAX COSTS.

[108 Pac. 61.]

Mr. Commodore S. Jackson, for the motion.

Mr. James C. Fullerton, contra.

Opinion by MR. CHIEF JUSTICE MOORE.

This is a motion to retax costs. The judgment rendered herein having been reversed, plaintiff's counsel filed in this court a cost bill containing, *inter alia*, the following demand: "Preparing transcript, including bill of exceptions, \$45." This item was disallowed by our clerk, and to review his action this motion was interposed.

2. It appears by affidavits that the charge so rejected was incurred in procuring the extension into longhand of the stenographic notes of the testimony given at the trial. The statute provides that when shorthand notes have been taken by an official reporter, if a party requests a transcript thereof, the reporter shall have it made, and the fee therefor shall be paid forthwith by the party for whose benefit it was ordered, and the expense thereof shall be taxed as other costs: Section 906, B. & C. Comp. In construing this enactment, it has been determined that in this court such costs are not proper disbursements in a law action, and that, in order to secure the payment of the sum paid to the official reporter for such service, the party entitled thereto must have such costs taxed in the

lower court: *Allen v. Standard Box & Lum. Co.*, 53 Or. 10 (98 Pac. 509); *Sommer v. Compton*, 53 Or. 341 (100 Pac. 289).

The motion is therefore denied.

REVERSED: MOTION TO RETAX COSTS DENIED.

Argued May 8, decided May 25, rehearing denied July 20, 1909.

STATE ex rel. v. MALHEUR COUNTY COURT.

[101 Pac. 907; 108 Pac. 446.]

PLEADING—ALLEGATION AS TO NOTICE—CONCLUSION OF LAW.

1. An allegation as to the notice of a local option election, that "no notice was ever issued or posted as by law provided," is a mere statement or conclusion of law, presenting no question of fact whether a notice was ever issued or posted.

MANDAMUS—SCOPE OF REMEDY.

2. If the making of an order is a mere ministerial act, involving no exercise of judgment or judicial power, mandamus is the proper remedy to compel it; but where an act is judicial or involves the exercise of judgment or discretion, and such judgment has been exercised, mandamus will not lie to compel amendment or correction thereof, though the action was erroneous.

MANDAMUS—ACTING IN JUDICIAL CAPACITY—ORDER OF PROHIBITION—COMPELLING AMENDMENT.

3. The county court, in including a city in an order of prohibition where it was claimed to be exempt by its charter from the operation of the local option law, acted in a judicial capacity, and the circuit court cannot compel it by mandamus to amend its order in this respect.

STATUTES—REPEAL BY IMPLICATION.

4. A clause in a city charter repealing all acts and parts of acts in conflict therewith, without reference to what particular acts it was intended to affect, would only accomplish a repeal by implication.

STATUTES—REPEAL BY IMPLICATION.

5. A repeal by implication only arises when both statutes cannot be reconciled with each other by any reasonable interpretation, or where the later act shows a clear intent by its terms to supersede the prior act.

STATUTES—REPEAL OF GENERAL STATUTES—OPERATION OF MUNICIPAL CHARTER PROVISIONS.

6. From the re-enactment of municipal charter provisions already in force with some additions thereto, and which is the old charter in a new dress, an intent to repeal a prior general statute will not be presumed.

STATUTES—REPEAL BY IMPLICATION.

7. Repeals by implication are not favored, and repugnancy between two statutes should be clear before a court is justified in holding that a later statute impliedly repeals an earlier one.

INTOXICATING LIQUORS—LOCAL OPTION LAW—REPEAL BY CITY CHARTER.

8. Section 18, Act February 21, 1905 (Sp. Laws 1905, p. 127), incorporating the City of Vale and repealing the act incorporating the town, gave the council power to "license, tax, regulate, or prohibit barrooms, drinking shops,

saloons, tippling houses, * * and all other places where spirituous, malt, or vinous liquors are sold," and also prohibited the issuance of any license for any less amount than that required by the State law. This section practically re-enacted Section 14 of the original town charter with some additions. No reference, however, was made in the new charter to the local option law. *Held*, that this did not repeal the local option law as to such city.

MANDAMUS—SUBJECTS OF RELIEF—COURTS AND JUDICIAL OFFICERS—
DECLARING RESULTS OF ELECTION.

9. Session Laws 1906, p. 45, § 7, requiring the clerk and sheriff, respectively, to issue and post notices of special local option elections, and to enter of record their compliance with such duty, and provides that such record shall be *prima facie* evidence that all provisions of the law have been complied with. Section 10 requires the clerk to call to his assistance two justices of the peace, and make an abstract of the vote of such election for the information of the county court, and on the eleventh day after the election the court is required to meet and immediately make an order of prohibition, if a majority of the votes in the county as a whole are for prohibition. *Held* that, after the court had acted upon the evidence which the law required to be furnished it, mandamus will not lie to compel the court to make an order excepting a certain city in the county from the operation of the order of prohibition made by it; such order not being among the duties of the court under the statutes.

From Malheur: GEORGE E. DAVIS, Judge.

Statement by MR. JUSTICE MCBRIDE.

This is a proceeding in mandamus to compel the county court of Malheur County to amend an order of prohibition made by it in June, 1908. The writ sets forth: That the petitioners are residents, taxpayers, and citizens of the City of Vale, in Malheur County, engaged in retail liquor business in that city, and have large sums of money invested in the same; that the city charter was passed by the legislature on the 21st day of February, 1905; that the local option law went into effect June 24, 1904; that by the charter the city council was granted full power and authority to license, tax, regulate or prohibit the sale of spirituous, malt, or vinous liquors; that on the 30th day of April, 1908, a petition was filed, calling for a vote on the question of prohibition in the county of Malheur as a whole; that no separate petition for a vote on prohibition was filed for the City of Vale; that an election was held pursuant to such petition, notwithstanding the fact that no notices were ever issued or posted as by law provided; that said election resulted

in a majority of 250 votes in favor of prohibition in Malheur County; that at some date in June, 1908, the county court met in special session for the purpose of making an order of prohibition, and thereupon made and entered an order or pretended order of prohibition for the whole county of Malheur, which order bore no date, but specified that prohibition would be in force under the regulations of the local option law from and after July 1, 1908; that said order of prohibition is without authority of law; that it will work great and irreparable injury upon relators and deprive them of their business, that by reason of the provisions of its charter, the City of Vale should have been excluded from the operation of the order of prohibition; and that said court was without authority to make any order that might limit the power of the common council regarding the sale of liquor. Defendants demurred to the writ, and the demurrer was sustained, from which order relators appeal.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. George W. Hayes*.

For respondents there was a brief over the names of *Mr. John W. McCulloch*, with an oral argument by *Mr. Andrew M. Crawford*.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

1. It is claimed by appellants that, irrespective of any view which the court below might have taken of the contention in regard to the plenary power of the City of Vale over the liquor traffic under the conditions of its charter, the allegation in the writ of failure to post notices of the election was sufficient to require the circuit court to hear and determine the case on that question. With this contention we are unable to agree. The writ is defective as to the allegation of want of notice. Its language is: "No notice was ever issued or posted as

by law provided." In this language it followed the petition. Had the pleader been content with alleging that no notice was ever issued or posted, an issuable fact would have been stated; but the addition of the words, "as by law provided," makes the allegation a mere statement of a conclusion of law. It is equivalent to saying that, in the pleader's judgment, there was something in the manner or time of posting, or in the substance of the notices, that rendered them invalid. There was therefore no question of fact to be tried by the lower court.

2. Upon the second proposition presented, we think the law is also with the respondent. It appears from the writ that in June, 1908, the county court made an order of prohibition which embraced the whole county of Malheur, including the City of Vale, which appellants claim was exempt, by the provisions of the charter, from the operation of the local option law. If the making of this order was a mere ministerial act, involving no exercise of judgment or judicial power, mandamus would probably be the proper remedy. 19 Am. & Eng. Enc. Law (2 ed.), 740; *Simon v. Durham*, 10 Or. 52; *Boston Turnpike Co. v. Pomfret*, 20 Conn. 590. But if the required act involves the exercise of judgment or discretion, or, in other words, if it is a judicial act and such judgment has once been exercised, mandamus will not lie to compel a tribunal to amend or correct its judgment, even though it may have acted erroneously. Tapping, *Mandamus*, 158, 160; High, *Extra. Legal Remed.* §§ 154, 188, 190. Mr. High, at § 154, states the rule as follows:

"Mandamus will not lie to compel a court to give a particular construction to a statute in a matter properly within its jurisdiction. And in all such cases the writ is refused regardless of whether the inferior tribunal has decided properly or improperly in the first instance." And again, at § 188, he says: "Nor will the writ be granted to reverse the decisions of inferior courts, upon matters properly within their judicial cognizance, or to

compel them to retrace their steps, and correct their errors in judgments already rendered." He further says (§ 190): "Even if the party aggrieved has no right of appeal, or if a writ of error will not lie to the judgment or ruling of the court below, the same inflexible rule applies, and, if the court properly had jurisdiction of the questions presented for its determination, the want of any remedy by appeal affords no ground for the exercise of the jurisdiction by mandamus."

3. Now while the mere act of examining the clerk's abstract of the vote and declaring the result of an election may be, in many cases, largely ministerial, we are of the opinion that, under the circumstances disclosed in the case at bar, the duties of the county court were, to a large extent, judicial. In the present case the court was confronted with a delicate question of law. If the City of Vale was exempt, by the conditions of its charter, from the operation of the local option law, it was the duty of the court to make that exemption apparent in its order. If it was subject to the provisions of that law, it was its duty to make an order which would apply to the county as a whole. A question of law was before it to be decided, and, in passing upon it, the court acted just as much in a judicial capacity as we do in passing upon the same question on appeal. We think the court below was correct in holding that it had no power to compel the county court to amend its order of prohibition.

4. But waiving these preliminary questions and coming to the main contention of appellants, was the action of the county court, in entering an order of prohibition for the entire county of Malheur, erroneous? The theory of appellants is, that the act of February 21, 1905 (Sp. Laws 1905, p. 127) repealed the local option law as to the City of Vale, and that no election for the county of Malheur, as a whole, could thereafter be held under the provisions of that law. They claim that the Vale charter, act of 1905, operates both as an express and an implied repeal of the local option statute, so far as the

City of Vale is concerned. We will consider both these propositions together. For a clear understanding of the subject, it will be necessary to consider chronologically the history of charter legislation, with reference to the town of Vale and its relation to State legislation, in regard to the sale of intoxicating liquor. The first charter of Vale was enacted February 21, 1889 (Sp. Laws 1889, p. 366). By section 18 subsec. 14, of that charter, the town council is given, among other grants of power, the right to "license, tax, regulate, restrain, suppress and prohibit barrooms, groceries, tippling houses, etc., and all citizens within the corporate limits shall be exempt from any county license, which is or may hereafter be imposed by the general laws of the State; that no license for the sale of spirituous, vinous or malt liquors shall be issued for a less sum than the amount of such license required by the general laws of the State." In 1901 the charter was again amended (Laws 1901, p. 281) in other particulars, but section 18, subsec. 14, was retained entire.

The local option law took effect June 24, 1904. On Feb. 21, 1905, an act was passed entitled "An act to incorporate the City of Vale and to provide a charter therefor and to repeal an act entitled 'an act to incorporate the town of Vale,' filed in the office of the Secretary of State, February 21, 1889, and to repeal an act amendatory thereto, passed February 15, 1901." An undescribed danger to the peace and health of the good citizens of Vale being somewhere concealed in the old charter, an emergency clause put the new one in force immediately. Sp. Laws 1905, p. 127. By section 18 of said act the council is given power among other things, "to license, tax, regulate or prohibit barrooms, drinking shops, saloons, tippling houses * * and all other places where spirituous, malt or vinous liquors are sold." Section 18 also contains the identical provision, prohibiting the issuance of a license for any amount less than that required by the State law, which is found in both previous charters

and contains further new and salutary restrictions upon the liquor traffic not necessary to mention in this opinion. It may be premised that, at the time this new charter went into effect, prohibition had not yet invaded Malheur County, and that the town of Vale, up to the time of the prohibition election in question in this case, was not restricted in any way in dealing with the liquor business as it saw fit. While the local option law was technically in force all over the State, from June 4, 1904, its effect was merely that of an enabling act authorizing the citizens of any particular locality in a convenient way to express their desire to have or not to have liquor sold within designated boundaries. Such was practically the holding of this court in *Renshaw v. Lane County*, 49 Or. 526 (89 Pac. 147). Such being the effect of the law, it had no effect *proprio vigore* upon the city charter of Vale, and there could be no conflict between the two statutes. From June 24, 1904, until the last election, the town of Vale could license the sale of liquor within its limits, and did so. The two laws were not repugnant. They both could be in force, and actually were in force, at the same time. It will be noticed that there was no reference to, or express repeal of, the local option law by the charter act of 1905. The clause repealing all acts and parts of acts in conflict with the charter act, without reference to what particular acts it was the intention of the legislature to affect, would only accomplish a repeal in any event by implication.

5. A repeal by implication only arises when both statutes cannot be reconciled with each other by any reasonable interpretation, or where there is a clear intent shown by the terms of the latter act that it shall supersede the other. We do not think such intent is manifest in the charter act of 1905.

6. As we have observed before, there is no mention made of the local option law in the title, while the original charter act of Vale and the act of 1901, amendatory, are

both mentioned, and the intent to repeal them plainly and unequivocally indicated. The maxim "*Expressio unius, exclusio alterius*," may well be invoked in this instance. While the title of the act professes to grant a new charter to the City of Vale, it is plain that section 18 of the new charter is practically a re-enactment of section 14 of the original charter, with some additions in the direction of definiteness. The power to license and regulate barrooms, groceries, and tippling houses, granted in the first two charters, is only more clearly expressed by adding the words "drinking shops, saloons and all places where spirituous, malt or vinous liquors are sold." Changing the name of the place from the "town of Vale" to that of the "City of Vale" does not alter the fact that the lawmaking power was legislating in respect to the same place and the same people. The section in question is not new legislation, but a re-enactment of provisions already in force, with some additions thereto. It is the old charter in a new dress. Under such conditions an intent to repeal a prior general statute will not be presumed. *Allison v. Hatton*, 46 Or. 370 (80 Pac. 101); *Renshaw v. Lane County*, 49 Or. 526 (89 Pac. 147); *Hall v. Dunn*, 52 Or. 475 (97 Pac. 811).

7. Repeals by implication are not favored, and repugnancy between two statutes should be clear before a court is justified in holding that a later statute impliedly repeals an earlier one. *Endlich*, *Interp. of Stat.* § 210; *Booth's Will*, 49 Or. 156 (61 Pac. 1135; 66 Pac. 710); *Bower v. Holladay*, 18 Or. 491 (22 Pac. 553).

8. The cases arising under local option laws of other states and cited in appellant's brief are not analogous to the case at bar. In *Tabor v. Lander*, 94 Ky. 237 (21 S. W. 1056), cited by appellant, the local option statute had been put in force by vote in a certain district, including the town of Hawesville. The whole district had given a majority for prohibition, but Hawesville had given a majority against it. Subsequently, and while

the district was still prohibition territory, the legislature amended the charter of Hawesville, so as to confer upon the town for the first time the right to license the sale of liquor. Under the circumstances the court held that a clear intent to repeal the local option law was indicated. In *State v. Clark*, 54 Mo. 17 (14 Am. Rep. 471), the court held that the language of the amendatory statute indicated a clear intent on the part of the legislature to repeal a State statute, by an amendment to the city charter of St. Louis. The case is not in point. In *Hall v. Dunn*, 52 Or. 475 (97 Pac. 811), the amended charter of Medford gave the city council power to license and regulate the sale of liquor "irrespective of any general law on this subject enacted by the legislature or the people at large." Here the intent to repeal is not concealed or left to conjecture. It is "writ large" in the very terms of the act itself.

We are of the opinion that the local option law was not repealed as to the City of Vale by the charter act of 1905.

The judgment should be affirmed.

AFFIRMED.

Decided July 20, 1909.

ON PETITION FOR REHEARING.

[108 Pac. 446.]

MR. JUSTICE MCBRIDE delivered the opinion of the court.

9. The motion for rehearing is based principally on the proposition that mandamus was the proper remedy of plaintiffs in their attempt to compel the county court of Malheur County to make an order excepting Vale from the effect of the order of prohibition made by it. As we held in our former opinion, and still hold, that the City of Vale was not exempt by the terms of its charter from the operation of the local option statute, the question whether mandamus would have been the proper remedy in case it had been so exempt is purely academic, and

all that was said on that subject was dictum. We do no disagree with counsel that a board, court, or person may be compelled to do an act purely ministerial, even though the doing of it requires him to exercise some judgment in his own mind as to what is the proper and lawful method; but, when he is called upon to declare the law, and to make an exception not made in the statute under whose terms he is attempting to act, he acts judicially. Plaintiffs were not asking the county court to make an order pursuant to the requirements of the local option statute, but asking that they ingraft thereon an order not contemplated therein, namely, excepting the town of Vale from its operation. Granting that the duties of the county court are purely ministerial, to what are they confined? Section 7 of the local option law (Session Laws 1905, p. 45) requires the clerk and sheriff, respectively, to issue and post notices of the special election, and to enter of record their compliance with this provision, and the statute provides that this record shall be *prima facie* evidence that all the provisions of the law have been complied with. Section 10 requires the clerk to take to his assistance two justices of the peace, and make an abstract of the vote for the information of the county court. Then on the 11th day after the election, the court is required to meet and immediately make an order of prohibition, if a majority of the votes in the county as a whole are for prohibition. Clearly the court, in making its order, acts upon the return of the sheriff and the abstract furnished by the clerk. The statute does not require it to hear testimony and conduct a fishing expedition to discover whether or not the sheriff and clerk have made a false return in respect to posting the notices or making the abstract. It must act "immediately." Now the writ does not traverse the return nor the abstract. It only attempts to traverse the fact that notices were posted; and, if an amendment were permitted to the writ, so that it should show that no

notices were posted, it would show no cause for mandamus proceedings against the county court. It acted upon the evidence that the law required it to act upon, and, its duties being ended, this court will not require it to again convene and to do its work over, and include therein the hearing of a contest on the facts that the local option law does not provide for. It has been suggested that, if we take this view, plaintiffs are left without remedy, but this does not logically follow. If, by the malfeasance of an officer, a false return was made, whereby the county court was deceived into making a false finding of the fact, the writer of this opinion feels certain that the law will afford plaintiffs an ample remedy. It is the boast of our jurisprudence that there is no wrong for which the law does not afford redress, and this case is no exception to the rule.

AFFIRMED: REHEARING DENIED.

MR. JUSTICE KING delivered the following dissenting opinion.

I agree with the majority opinions in holding that the alternative writ does not state sufficient facts to entitle petitioners to the relief demanded, but for that reason only do I hold that the remedy sought to be invoked will not lie. The effect of the majority opinions, however, is to hold that, even though sufficient facts were stated to demonstrate that the election was void, mandamus would not be the proper remedy. With this conclusion I do not agree. If at the time the proceedings were instituted the county court had not declared the vote, injunctive relief would have been available, but, since there is nothing left, so far as the court is concerned, to enjoin, this remedy, it occurs to me, cannot well be invoked. In fact it is so held in *McWhirter v. Brainard*, 5 Or. 426. Under the holding of this court in *Raper v. Dunn*, 53 Or. 203 (99 Pac. 889) and *Garrison v. Malheur County Court*, 54 Or. 269 (101 Pac. 900), review will lie, from which it follows that, unless the remedy by

mandamus is available, petitioners are without a remedy. In a very clear and well-reasoned opinion by Mr. Justice BRANNON, in *Marcum v. Pilot Commissioners*, 42 W. Va. 263 (26 S. E. 281: 36 L. R. A. 296), it is held that the inefficiency of all other remedies required that mandamus should be recognized, even though the acts involved were of a quasi judicial nature. If the rule invoked by the majority in this case is to prevail, it may become necessary to recognize a suit in equity to vacate the order of the court as the proper procedure, else make an exception to the well-established principle suggested by Mr. Justice MCBRIDE that "there is no wrong for which the law does not afford a remedy," but why the necessity of further drawing upon a court of equity, when the same result can as readily and conveniently be accomplished by the proceeding before us? It is true petitioners have sought an adjudication to the effect that Vale is without the operation of the local option statute, and this court has held that the charter does not have the legal effect insisted upon in that respect; and in that I concur, but let it be remembered that the further position is taken, and so attempted to be pleaded, that the election in the entire county is void, and it is conceded that, if sufficiently pleaded, the position would be well taken. This could be done by amendment, to allow which is within the discretion of the court where pending; and I know of no reason why the same privilege should not be granted the petitioners in this respect as was extended to the pleaders in a like case: *State v. Richardson*, 48 Or. 309 (85 Pac. 225: 8 L. R. A. [N. S.] 362); and also recognized in *Fishburn v. Londerhausen*, 50 Or. 363, 377 (92 Pac. 1060, 1065: 14 L. R. A. [N. S.] 1234, 1242) and *Powell v. Dayton*, 14 Or. 22 (12 Pac. 83). Nor can it make any difference that the prayer asks relief as to the town of Vale only; for, if the election in the entire county is void, it must necessarily be ineffectual as to

the lesser district, Vale, regardless of whether the language of the charter is sufficient to take the locality out of the operation of the local option law or not. The question, therefore, as to the effect of the charter upon the general law, when viewed in connection with the other points presented, becomes unimportant. But conceding that the effect of the language of the charter was one of the question to be determined by the county court in connection with other features, before declaring the result of the vote, I think the acts of that body are ministerial only, and cannot properly be classed as judicial. Nor can the fact that one of the members is a judicial officer make any difference in this respect. It is nothing unusual for ministerial duties to be imposed by statute upon judicial officers, the performance of which often requires the application, and thereby the interpretation, of laws. As stated by the court in *re Harris*, 12 Misc. Rep. 228 (33 N. Y. Supp. 1106): "It is not every exercise of judgment by a ministerial or administrative officer or body that can be held to be the exercise of a judicial function or judicial act. A sheriff is required to determine, at his peril, whether a process he is required to execute is fair upon its face, but such exercise of his judgment is not a judicial act." To the same effect, *Speer v. Stephenson* (Idaho) 102 Pac. 365, 371; *State v. County Judge*, 7 Iowa 187.

It is unnecessary, however, to look beyond our own jurisdiction for authorities upon this subject. As above stated, this court in *McWhirter v. Brainard*, recognized mandamus as the proper remedy to test the qualification of voters, the legality of the conduct of judges, as well as other matters incidental to the canvass of an election called to determine the selection of a county seat, notwithstanding these questions involve some intricate points of law, or mixed questions of law and fact. So, too, in *Shively v. Pennoyer*, 27 Or. 33 (39 Pac. 396), the same remedy was invoked to compel the execution of a deed

by the board of land commissioners, in which instance it was first necessary to determine whether the applicant had complied with the requirements of the law on the subject. *State v. Malheur County Court* was a special proceeding instituted against the county judge and commissioners to compel them as a court to declare the result of an election held November 8, 1904, for the purpose of determining whether the sale of intoxicating liquors as a beverage should be prohibited in Nyssa precinct. The county judge in his answer expressed a willingness to make the order sought to be enforced, while the commissioners after denying the material averments of the writ, alleged, among other things, that the local option act contravened certain clauses of the constitution of the State, and that the notices of the election were not printed until 16 days prior to the election. It thus appears that there were questions to be determined by the county court in that case equally as judicial as any involved here. In considering that phase, Mr. Justice WOLVERTON, in *State v. Malheur County Court*, 46 Or. 519 (81 Pac. 368), holds the duties of the court in this regard to be ministerial only. I think, therefore, the conclusion reached on this point by the majority, inconsistent with all previous adjudications by this court upon these points.

In conclusion, I understand the majority to hold, in effect: (1) The county court in declaring the result of a local option election acts in judicial capacity, by reason of which mandamus will not lie; and (2) even were it successfully averred that the election was void, petitioners have mistaken their remedy. I think the holding as to both positions in conflict with the previous adjudications on the subject. If the majority opinions in this case and in *Roesch v. Henry*, 54 Or. 230 (103 Pac. 439), are to stand, all previous decisions by this court bearing on the subjects therein discussed should, in order that there may be no further misunderstanding among the courts and bar upon the subject, be given a respectable

burial by expressly overruling them. I think sufficient doubt as to the correctness of the conclusions reached exists to justify a rehearing in this court, and that it should be so ordered.

Argued May 8, decided May 26; rehearing denied July 30, 1909.

GARRISON v. MALHEUR COUNTY COURT.

[101 Pac. 900.]

CERTIORARI—WRIT OF REVIEW—INTERESTED PARTY—RECORD.

1. Writ of review to revise the action of the county court in making an order of prohibition following an election is properly dismissed; neither the petition nor the writ showing that petitioner appeared in the county court to oppose the order, and so not disclosing that he was an interested party.

CERTIORARI—WRIT OF REVIEW—DEFECT OF PARTIES—WAIVER.

2. Respondents, by making full return to the writ, without interposing any motion to quash or any demurrer on account of defect of parties, will not be held to have waived, and so to be precluded from raising the objection that the petitioner for writ of review was not shown to be an interested party, the statute making no provision for demurrer or motion to quash, but the inferior court having no alternative, when the writ issues, but to send up its return, whereof the hearing is on inspection of the writ and the return.

From Malheur: **GEORGE E. DAVIS**, Judge.

Petition by Floyd Garrison for writ of review against B. C. Richardson and others, commissioners of Malheur County, constituting the county court thereof. From an order of the circuit court dismissing the writ, petitioner appeals.

Statement by **MR. JUSTICE MCBRIDE**.

This is an appeal from a judgment of the circuit court for Malheur County dismissing the writ of review brought by appellant to revise the action of the county court of Malheur County in making an order of prohibition following the election of 1908. As showing the right of appellant to the writ, it is alleged that petitioner is a citizen, resident, taxpayer, and legal voter of the City of Vale, in Malheur County, Oregon, and that at the date of the order complained of he was engaged in the retail liquor business in said city, and pays an annual license of \$600. The other facts set forth in the petition are not necessary to a decision of this cause.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. George W. Hayes*.

For respondent there was a brief over the name of *Mr. John W. McCulloch*, District Attorney, with an oral argument by *Mr. Andrew M. Crawford*, Attorney General.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

1. Neither the petition for the writ nor the writ itself show that appellant ever appeared in the county court to oppose the order sought to be reviewed in the circuit court. Therefore he comes within the rule announced by this court in *Raper v. Dunn*, 53 Or. 203 (99 Pac. 889).

2. Counsel for appellant ingeniously argues that respondents, having made full return to the writ in the court below, without interposing any motion to quash or any demurrer on account of defect of parties, are precluded from raising that question, and will be held to have waived it. The practice at circuit in these particulars has been different in different courts and even in the same court has varied, according to the ideas of different attorneys. But the statute itself makes no provision for demurrer or motion to quash. When the writ issues, the inferior court has no alternative but to send up its return, and the hearing is then had upon inspection of the writ and the return, and no demurrer or motion is necessary.

This being our view of the case, the judgment of the circuit court will be affirmed.

AFFIRMED: REHEARING DENIED.

Argued May 8, decided May 25; rehearing denied July 20, 1900.

HART v. MALHEUR COUNTY COURT.

[101 Pac. 600.]

From Malheur: GEORGE E. DAVIS, Judge.

Petition by J. H. Hart for writ of review against B. C. Richardson and others, commissioners of Malheur

County, constituting the county court. From an order of the circuit court dismissing the writ, petitioner appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. George W. Hayes*.

For respondent there was a brief over the name of *Mr. John W. McCulloch*, District Attorney, with an oral argument by *Mr. Andrew M. Crawford*, Attorney General.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

This case was submitted at the same time with the case of *Garrison v. Malheur County Court* (heretofore decided by this court), *supra*; the pleadings and facts being the same in both cases. Following that case and the case of *Raper v. Dunn*, 53 Or. 203 (99 Pac. 889), the judgment of the court below will be affirmed.

AFFIRMED: REHEARING DENIED.

Argued May 25, decided June 8, rehearing denied July 20, 1909.

FLANAGAN v. JONES.

[102 Pac. 301.]

APPEAL AND ERROR—BRIEFS—EXCUSE FOR FAILURE TO FILE.

Engagements in causes in other courts afford no excuse for failure to file briefs within the time prescribed by the rules of court.

From Josephine: *HIERO K. HANNA*, Judge.

This is a suit by *W. H. Flanagan* against *Ed. Jones*. From a decree in favor of plaintiff, defendant appeals. Respondent files in this court a motion to dismiss the appeal.

Motion allowed.

DISMISSED.

Mr. George W. Colvig, for the motion.

Mr. George H. Durham, *contra*.

Opinion by MR. CHIEF JUSTICE MOORE.

This is a motion to dismiss an appeal. A decree in this suit was rendered against the defendant, to reverse

which he perfected an appeal, and filed in this court an abstract and a transcript. As the cause was in equity and to be tried anew, the plaintiff, though the respondent, complying with rule 6 of this court (50 Or. 572: 91 Pac. VIII), filed Mar. 29, 1909, the first brief, and sent copies thereof by registered mail to the defendant's counsel at his office at Crescent City, California. The copies, however, not having been called for, were returned to the person sending them. The defendant was required to file his brief on or before April 18, 1909, but not having done so, the plaintiff's counsel, on May 14th, interposed this motion. The defendant's counsel, resisting the application, filed an affidavit, in which he states that in the latter part of March, 1909, in order to try some causes, he was obliged to go to Oakland and San Francisco, where he was detained longer than he expected, and did not return to his office until the 15th of the following May; that he wrote to our clerk inquiring about the status of the case at bar, and in reply thereto received a letter which stated that the appellant's brief herein was filed March 29, 1909; that from the information so received he believed that a local attorney, who had procured the transcript on appeal herein, had also prepared and filed the brief referred to, and that he was not advised to the contrary until the defendant notified him on May 21st that no brief on the part of the appellant had been filed. In his letter the clerk inadvertently used the words "appellant's brief" for the phrase "respondent's brief," and had his letter been received prior to April 18, 1909, the defendant's counsel, by relying upon the erroneous statement therein, might have neglected to file a brief for his client, believing that a local attorney had performed that service; but the original letter referred to in the affidavit is dated April 30, 1909, and acknowledges the receipt of a letter written by the defendant's counsel three days prior thereto, but nine days after he was in default. An attorney's business engagements in making preparation for,

or in the trial of, causes in other courts afford no excuse for a failure strictly to comply with the rules of this court. Prior to default, however, such a modification of the rules as will subserve the interests of the attorney applying therefor will ordinarily be granted, provided such alteration does not interfere with the orderly dispatch of business in this court, or seriously inconvenience adverse parties: Rule 11 of the Supreme Court (50 Or. 578: 91 Pac. X). No reasonable excuse has been given by defendant's counsel for the delay, nor any showing made that his brief has been prepared. The appeal should be dismissed; and it is so ordered. DISMISSED.

Argued May 3, decided May 25, rehearing denied July 20, 1909.

SHAFER v. BEECHER.

[101 Pac. 890.]

APPEAL AND ERROR—TIME TO FILE BRIEF—EXCUSE FOR FAILURE.

The failure of appellant to file his brief, due under rule 37, 50 Or. 588 (91 Pac. XII) on February 20th, until April 7th following, or to apply for an extension of time in which to file brief, is not excused by a showing of pressure of business on the part of his attorney and a delay of the printer in getting out the copy, and the judgment will be affirmed.

From Wallowa: JOHN W. KNOWLES, Judge.

ON MOTION TO AFFIRM.

Statement PER CURIAM.

This is an appeal from the circuit court of Wallowa County in an action by F. F. Shafer against Oral Beecher. From a judgment in favor of plaintiff, defendant appeals. The bill of exceptions was settled and allowed December 19, 1908. The transcript was filed in this court January 20, 1909. Under rule 37 of this court (50 Or. 588: 91 Pac. XII), appellant should have filed his brief before February 20, 1909. It was actually filed April 7, 1909.

Respondent, on March 31, 1909, filed a motion to affirm the judgment on the ground of appellant's failure to file his brief within the time prescribed by rule 37 (50 Or.

588: 91 Pac. XII). At the hearing appellant filed an affidavit in excuse of his delay in filing brief.

AFFIRMED.

Mr. James A. Burleigh, for the motion.

Mr. Daniel W. Shehan, *contra*.

PER CURIAM: Appellant's brief was due, under rule 37 of this court (50 Or. 588: 91 Pac. XII), on February 20, 1909. It was not filed until April 7, 1909. Appellant submits affidavits of his attorney, showing pressure of business upon himself in court, and delay on the part of the printer in getting out the copy, which affidavit is supplemented by an affidavit of the printer as to various delays caused by failure to get competent workmen in his job office.

We think reasonable diligence, under the circumstances, required the appellant to apply to this court for an extension of time, and that the matter set forth in the affidavits filed by him is not sufficient to excuse his long delay in filing such briefs or his neglect to apply for an extension of time in which to do so.

The judgment of the court below will be affirmed.

AFFIRMED.

Argued March 10, decided May 18, rehearing denied July 20, 1909.

AMES v. MOORE.

[101 Pac. 769.]

DEEDS—MENTAL CAPACITY—EVIDENCE.

1. Evidence, in a suit to set aside a deed, *held* to show that, though the grantor was old, with the natural enfeeblement of physical and mental powers, she retained an unimpaired judgment and an active memory rendering her competent to make a valid contract.

DEEDS—VALIDITY—UNDERSTANDING OF GRANTOR.

2. Evidence, in a suit to set aside a deed, *held* to show that the grantor understood the nature and effect of her act and intended to execute an absolute deed.

DEEDS—VALIDITY—MISTAKE.

3. There having been no mutual mistake in the execution of a deed and a contract by the grantee to take care of the grantor in consideration of the

deed, the grantee's belief that the legal effect of the instruments was to give him only a lease for the life of the grantor is no ground for setting aside the deed or limiting it to such effect.

DEEDS—CONSIDERATION.

4. The contract of a son to take care of his mother for life for a conveyance of land is sufficient consideration for the deed.

DEEDS—CONSIDERATION—PERFORMANCE.

5. The consideration of a deed from mother to son of her farm, his contract to immediately commence settling his business where he was living, and as soon as convenient to move to the farm and cultivate it, to maintain for her exclusive use, commencing the following July, a room on the premises, and to furnish her support, was fully performed, though the grantor died two days after the grantee's arrival and before the time for maintenance of the room.

DEEDS—DELIVERY.

6. Delivery to the grantee of a deed, the consideration of which is his contract to take care of the grantor for life, passes the title.

DEEDS—VALIDITY—FRAUDS AND MISREPRESENTATIONS—EVIDENCE.

7. Evidence, in a suit to set aside a deed, held to show no fraud or undue influence practiced by the grantee on the grantor.

From Douglas: JAMES W. HAMILTON, Judge.

Statement by MR. CHIEF JUSTICE MOORE.

This is a suit by Sarah S. Ames and others against Shelton D. Moore, to set aside a deed to real property. Sarah A. Moore, the mother of the defendant, being the owner of a farm in Douglas County, executed to him a warranty deed thereof, in consideration of \$1 and of his written agreement to abide by the following conditions: That he would immediately commence settling his business in Josephine County, and as soon as convenient would move to the farm and cultivate it; that beginning with July 1, 1906, he would maintain for her exclusive use a convenient room or other domicile on the premises; that he would furnish her clothing, support, and medical care, in accordance with her station in life, during her remaining years; and that at her death he would defray the expenses of her last sickness and of her funeral. Mrs. Moore died November 2, 1905, aged eighty-one years, eleven months, and twenty-three days. Her last will having been admitted to probate, her daughters, the plaintiffs, Sarah S. Ames and Mary Wolcott, who, with the defendant, were designated as her residuary legatees,

instituted this suit, making H. L. Gilkey, the administrator with the will annexed, a party plaintiff.

The gist of the action is the alleged mental incapacity of Mrs. Moore at the time the deed was given. The cause being at issue was referred, and from the testimony taken the court made findings of fact, and, based thereon, set aside the deed. From this decree the defendant appeals.

REVERSED: DISMISSED.

For appellant there was a brief and an oral argument by *Mr. H. D. Norton*.

For respondent there was a brief over the names of *Messrs. Fullerton & Orcutt*, with an oral argument by *Mr. Albert N. Orcutt*.

Opinion by MR. CHIEF JUSTICE MOORE.

1. In order to determine whether or not Mrs. Moore was competent to execute a valid contract on August 29, 1905, we shall examine the state of her health and her mental condition prior and subsequent to the signing of the deed. In November, 1902, she had an attack of pneumonia, which seemed to render her peevish and to impair her memory somewhat. During the cold weather she occasionally had neuralgia, and when suffering therefrom appeared to be almost distracted. The last year of her life she would mutter and talk aloud when no one was near. She did not converse with her sons or daughters about her business. She safely guarded her property interests, and at her death possessed \$10,366 in money, most of which was deposited with a bank. She remembered a granddaughter, who visited her in September, 1905, and though she had not seen this relative for 20 years, yet she had a clear recollection and talked about the circumstances of this granddaughter's early life. She seemed to forget, however, the little incidents which occurred on the preceding day. Thus she ordered a load of wood, and when it arrived admitted that she

did not remember requesting it. At another time she asked to be taken to town, and the next day denied that she had so solicited.

Witnesses called by the defendant testified that, considering her age, Mrs. Moore was remarkably intelligent, that she was exceedingly alert in all business matters, and that she was able to conduct a sustained conversation on any subject without her mind wandering. The cashier of the bank in which she deposited her money, referring to Mrs. Moore, testified: "I thought she was rather better than the average business man to transact business for herself." Drs. E. J. Page and W. C. Gilmour, who were Mrs. Moore's physicians during her last illness, and Dr. W. H. Flanigan, who had for many years been her family physician and was called in consultation the day before she died, expressed the opinion that she was capable of making a valid contract. Mrs. Moore, in 1903, sold her real property in Josephine County, where she had lived many years, and moved to Douglas County, where she purchased the farm in question, paying therefor \$5,500; but missing the acquaintances with whom she had so long associated, and wishing to return to the neighborhood of her former home, she desired to sell this farm, and offered it for \$7,000. The plaintiff, Mrs. Wolcott, who in 1905 lived in Douglas County, wrote to the defendant, who then lived in Josephine County: That their mother contemplated selling the farm; that she was growing feeble; and that, because she insisted upon living alone in a log house on the land, some of her neighbors thought she was not in her right mind, and believed that a person ought to be selected to look after her property. Replying to such letter, the defendant wrote that he thought that any deed their mother might make would be ineffectual, and would be set aside, upon her death, in a suit instituted by her heirs for that purpose. He further stated that, if the officials of Douglas

County should conclude to appoint a guardian for his mother, he would apply for the position.

The defendant went from his home in the summer of 1905 to visit his mother, and upon his return H. D. Norton, an attorney at Grant's Pass, mailed a typewritten letter to Mrs. Moore, inclosing a deed and a contract which were indited in the same manner. After detailing the substance of the agreement, the letter contains the further statement: "If the papers as drawn meet with your approval, kindly execute the same before Mr. Dimmick, who, I understand, is a notary public at Oakland, and forward the deed and copy of the contract to me and I will thereupon have Shelton (the defendant) execute the copy and will forward one to you for your keeping and thereupon deliver the deed and other copy of contract to him." Norton also wrote to Z. L. Dimmick, the notary, that, if Mrs. Moore called upon him for the purpose of having the instruments executed, he should summon a physician as a witness to ascertain whether or not she possessed sufficient mental capacity to make a valid contract. Mrs. Moore, having received the papers, took them, August 29, 1905, to Dimmick, who, complying with the instructions which he had received, called Dr. Gilmour to determine the inquiry suggested. The doctor concluded that she was competent, whereupon the papers were executed, placed in an envelope, directed to Norton, and given to Mrs. Moore, who mailed the package. Upon its receipt the attorney secured the defendant's signature to a duplicate of the contract and mailed it to her. The deed, however, was not recorded until November 2, 1905, and, except the defendant, none of Mrs. Moore's heirs were notified that she had made the conveyance.

Dr. Gilmour testified that he had visited Mrs. Moore professionally, and, having identified the deed and contract, the execution of which he witnessed, was asked what the grantor declared at that time, and replied: "Mrs. Moore said that she was entering into an agreement

with her son to take care of her during her lifetime, and deeding him this place, and she says: 'I want to do this, and I want you to see that I am capable of doing this kind of business; that I know what I am doing. I want you to understand this contract between Shelton and myself.' And she says to me, 'Doctor, don't you think that I know how to do business?' and I says, 'Yes, I think you know how to do business as well as any one I know of.'" Referring to the time the papers were signed, the physician said, "The old lady's health for one of her age was good." In answer to what he considered her then mental condition to be, he further stated: "Well, I thought she was fully able to make a contract of that kind as any one that I am acquainted with. She was bright mentally. I know I got the impression that if any one gets ahead of you, old girl, they will have to get up early in the morning." Dimmick, the notary public, referring to Mrs. Moore's mental condition when he took her acknowledgement, said, "I felt that she was competent to transact business."

The defendant testified that he visited his mother at her solicitation, and she offered to convey the farm to him if he would move to the premises and support her during the remainder of her life, which testimony is corroborated by his son, who was present during the conversation. The defendant further deposed that he knew that his mother had made a will devising and bequeathing her property, and he thought such testamentary disposition would invalidate any deed she might make to the farm; but he informed her that, if Norton was of the opinion that the signing of the will would not defeat her conveyance of the land, he would accept the offer; that he consulted about the matter with the attorney, and was informed that the making of the will would not interfere with a conveyance of the farm, whereupon the papers were prepared and mailed to her by the attorney. The defendant further stated that, when he made the con-

tract with his mother, she seemed fully to understand what she was doing, and that, believing her mental capacity would be challenged, he suggested to the attorney the necessity of securing a physician as a witness to the execution of the deed.

The foregoing narrative, though quite brief as compared with the volume of testimony given on this branch of the case, we believe to be a sufficient statement of Mrs. Moore's physical and mental condition at the time she executed the deed. She was quite active for a person of her advanced age. In business ventures she had been successful, and the money which she possessed at the time of her death was probably accumulated by carefully saving small sums, and from the habit thus acquired she undoubtedly was very frugal. Her memory, though not retentive of recent trivial events, was nevertheless active, for it will be borne in mind that she remembered a granddaughter whom she had not seen for 20 years. That Mrs. Moore muttered and talked to herself is a circumstance from which intellectual impairment might be inferred; but as it is a well-recognized fact that persons who live alone, as she did much of the time, often give oral expression to their thoughts, the existence of that habit does not necessarily show such a degree of feebleness of the mental faculties, resulting from old age, as in her case to be designated as dotage. It appears that Mrs. Moore permitted a small dog to remain in the house which she occupied, and that she spat on the floor—things which she would never have done or tolerated in others about her home in her earlier life. The house in which Mrs. Moore lived was very old, much dilapidated, and the floor was probably in such a state of decay that her sense of cleanliness was not shocked by the practice which was attributed to her. As she lived alone much of the time, she may have kept the dog in her home for the protection which his watchfulness afforded, and particularly so since she at all times, as appears from the

testimony, kept some money hidden about the premises. Under such circumstances, Mrs. Moore's custom of keeping a dog in the house and of spitting on the floor cannot be regarded as furnishing much evidence of any loss of mental power. After the attack of pneumonia which Mrs. Moore had, she became irritable; but mere peevishness and excitability of disposition do not of themselves constitute proof of intellectual degeneracy: 16 Am. & Eng. Enc. Law (2 ed.) 611. Mrs. Moore was at times afflicted with neuralgia, which affected her very much; but, as these attacks occurred in the winter, as testified by Dr. Flanigan, and were probably superinduced by cold weather, she was evidently not inconvenienced by any nerve affection in August, when the deed was executed. We are satisfied that, though Mrs. Moore's old age was accompanied by a natural enfeeblement of physical and mental powers, yet the sagacity for which she had been noted, and which she exercised in all business transactions, remained intact until her death, evidencing an unimpaired judgment, which, in all cases, is the criterion of mental capacity.

The evidence shows that when Mrs. Moore purchased the Douglas County farm she expressed an intention to have the land conveyed to her daughters, the plaintiffs, and to her son, the defendant; but instead, when the deed was executed, she took the title in her own name. For a share of the crops she leased the farm to her son-in-law, Grant Ames, for a term to expire October 1, 1904. During his tenancy a freshet carried away a part of her fence, and because he refused to make the necessary repairs, in consequence of which some of the crops were destroyed by hogs, Mrs. Moore became angry at him, moved from the dwelling house on the farm into an old log cabin on the premises, and, beginning with the close of his term, leased the land to another for one year. Mrs. Moore, in the fall of 1904, moved to Oakland, where she took a lease of a house and cared for herself until Jan-

uary 1, 1905, when her daughter, Mrs. Wolcott, also moved into the same dwelling, where she lived until July 1st of that year. As Mrs. Wolcott's husband was an invalid and unable to perform manual labor, the burden of supporting his family devolved upon his wife, and for this reason he seemed to be the object of resentment by his mother-in-law, who frequently remarked that she intended so to dispose of her property that neither he nor Ames could secure any of it, but that their wives should annually have the use of a part thereof for their respective lives. Mrs. Moore died, however, before consummating such a change in her last will and testament. The deed to the defendant was evidently made to effectuate her purpose of preventing Ames and Wolcott from enjoying any of her bounty, though she expected to reward their wives for the kind services they had rendered her. We believe that Mrs. Moore possessed sufficient intelligence to remember those that should have been the objects of her bounty, to comprehend the extent and character of her property, and to realize that the execution of the deed to the defendant would necessarily deprive her other residuary legatees of an equal distribution of her estate, and that she possessed an "active memory," rendering her competent to make a valid contract: *Carnegie v. Diven*, 31 Or. 366 (49 Pac. 891); *Swank v. Swank*, 37 Or. 439 (61 Pac. 846); *Dean v. Dean*, 42 Or. 290 (70 Pac. 1039); *Hamilton v. Holmes*, 48 Or. 453 (87 Pac. 154); *Owings v. Turner*, 48 Or. 462 (87 Pac. 160); *Reeder v. Reeder*, 50 Or. 204 (91 Pac. 1075).

2. The plaintiffs' counsel, in order to maintain the decree rendered in the case at bar, contend, in effect: That Mrs. Moore, by reason of extreme age, did not understand the nature or effect of her act, and never intended to execute an absolute deed; that she was persuaded to sign the instrument in consequence of the defendant's undue influence and misrepresentation which, in her enfeebled condition, she could not resist; that she was the victim of a

fraud practiced by her son, who obtained the conveyance for the consideration expressed in the contract; that the deed is void because it is founded upon an inadequate consideration, which, though specified, was never performed; and that the instrument never really went into effect.

The questions will be considered in the order stated. The testimony shows that, although Mrs. Moore could not well read ordinary manuscript, she could peruse printed matter. Hence since the deed, contract, and letter were typewritten, she surely understood the contents of these papers. It will be remembered that, when she took these papers to Oakland, she stated, in the hearing of Dr. Gilmour, the purpose of her visit, and also detailed the substance of the deed and contract, thus conclusively, we think, proving that she understood the nature and effect of her act and evidencing her intention to execute an absolute deed.

3. The defendant, prior to August 29, 1905, stated to some of his relatives that, if he could secure a lease of his mother's farm for the term of her life, he would improve the premises and care for her during that time. After the deed was signed, he also explained to others that he had obtained a life lease of such land. These declarations, it is asserted by plaintiffs' counsel, tend to show that Mrs. Moore understood that she was leasing the farm to defendant, and not conveying it to him. The defendant's explanation of his assertions, as detailed, is that he understood his care for his mother during her life made the transaction equivalent to a lease of the premises for that term. His belief as to the legal effect of the deed and contract will not govern their interpretation, unless there was a mutual mistake in their execution, which evidently is not the fact. The deed was executed in the absence of the defendant, who had not seen his mother since he called upon her. What time intervened between such visit and the making of the

deed cannot be determined from the testimony with any degree of accuracy. No evidence of any misrepresentations made by the defendant to his mother appears from an inspection of the transcript. It is very doubtful if he or any other person was capable of influencing her in any manner, for she possessed to the last an indomitable will. This trait of character is evidenced by the testimony of Mrs. Wolcott, who, when interrogated concerning her mother, deposed as follows:

"Q. Did you find that it was easy to persuade her in various matters?"

"A. No, sir; I did not."

"Q. It is pretty hard to persuade her?"

"A. Yes, because I tried to persuade her to come back here in Oakland, but she would not stay."

We believe Mrs. Moore's extreme age and enfeebled condition did not prevent her from exercising an independent judgment, since she deliberately determined to exclude her sons-in-law, Ames and Wolcott, from participating in the distribution of her property, and to convey the farm to the defendant. A careful examination of the testimony fails to disclose any fraud practiced by the defendant upon his mother.

4. The remaining question is the validity of the deed, which, it will be remembered, is challenged on three grounds. The contract of a son or daughter to care for and support parents during their lives, for a conveyance of real property, is deemed an adequate consideration for the land: Page, Cont. Section 224. If the terms of a contract are faithfully executed by the grantee, the intimate relation existing between such parties prevents a comparison of the worth of the property conveyed with the value of the services stipulated to be performed: Pomeroy's Eq. Juris., Section 962. For any substantial failure in this respect, however, a court of equity will, in a suit instituted for that purpose, set aside the agreement of the parties and reinvest the title to the land in

the parent: *Thomas v. Thomas*, 24 Or. 251 (33 Pac. 565). In the case at bar, Mrs. Moore did not transfer all her property to the defendant, for it will be remembered that at her death she possessed \$10,366, one-third of which sum, less the expenses of administration, Mrs. Ames and Mrs. Wolcott will receive. A person who is *sui juris* and has no creditors may make such disposition of his property by will or deed as he pleases, and, though expectant heirs may be disappointed by the distribution made by their ancestor, the law affords them no remedy for the frustration of the hopes which they entertained. We believe the consideration expressed in the deed and contract was sufficient.

5. The testimony shows that, after the agreement was consummated, the defendant immediately began making preparations to move to the farm, by disposing of his property and closing up his business in Josephine County, as required by the terms of the contract. Before he had completed such arrangements, however, his mother became ill and was taken to a neighbor's house. Upon receiving notice thereof, he instantly went to her, and she promised to remain where she then was until he could establish a home on the farm; but, after he left, her health being somewhat restored, she returned to the log house, where the defendant found her when he moved with his family, arriving two days prior to her death. The contract made it necessary for the defendant to maintain a separate room for his mother, beginning July 1, 1906; but he was required to commence caring for her as soon as he could conveniently adjust his business in Josephine County and move to the farm. He performed the consideration specified in the contract.

6. The deed, executed by his mother, was duly delivered to him soon after its execution, and such surrender effectuated a transfer of the title, though the deed was not immediately recorded.

7. Believing that Mrs. Moore on August 29, 1905, was competent to make a valid contract; that she was not induced by fraud or undue influence to execute the deed, and that the consideration therefor was adequate and fully performed, the decree is reversed, and the suit dismissed. **REVERSED: DISMISSED: REHEARING DENIED.**

Decided July 20, 1909.

CITY OF NYSSA v. MALHEUR COUNTY.

[108 Pac. 61.]

STATUTES—SPECIAL LAWS.

Nyssa City Charter (Sp. Laws 1903, c. 4), § 16, providing that the territory within the city limits shall be without the jurisdiction of the county court for the purpose of road taxes, is not in conflict with Section 23, Article IV, Constitution of Oregon, prohibiting any special law for laying, opening, and working highways, and for the assessment and collection of taxes for road purposes, and the city authorized by the charter to levy and collect taxes, etc., may demand from the county, road taxes collected on property within the city.

From Malheur: **GEORGE E. DAVIS, Judge.**

Statement by **MR. JUSTICE MCBRIDE.**

This is an action at law brought by plaintiff, the City of Nyssa, against Malheur County, to recover certain moneys collected by the county, within the corporate limits of plaintiff for road tax. Plaintiff contends that, under certain provisions of its charter, it is entitled to all the road tax collected on property within its limits, and that defendant refuses to pay over the same. Defendant demurred generally to the complaint. The demurrer was sustained, and plaintiff appeals.

REVERSED.

Submitted on appellant's brief under the proviso of Rule 16 of the Supreme Court: 50 Or. 580 (91 Pac. XII).

For appellant there was a brief over the name of *Mr. C. C. Wilson.*

No appearance for respondent.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

There was no brief filed or appearance made in this court on behalf of defendant, and perhaps we would be justified in assuming that defendant has abandoned its contention in the matter, but nevertheless we feel constrained to give the case such examination as the circumstances will permit.

Plaintiff's right to recover these taxes depends upon the construction of certain sections of its charter and of Subdivisions 7 and 10 of Section 23, Article IV, Constitution of Oregon. Section 3, Chapter 3, Nyssa City Charter, reads as follows: "The city treasurer shall receive from the sheriff of Malheur County, Oregon, all taxes levied by the council and collected by said sheriff, and shall receive all other money belonging to the city": Sp. Laws 1903, p. 784. The following sections of the charter also relate to the subject under consideration: "The common council shall have power to assess, levy, and collect taxes for general municipal purposes, not to exceed 10 mills, annually, on the dollar of all property, both real and personal, which is taxable by law for state and county purposes, and such tax shall be assessed, levied and collected in all respects in accordance with the terms of an act passed by the legislature in 1893, entitled: 'An act to secure more convenient mode of making assessments and of collecting and paying taxes, and to amend Section 2794 of the General Laws of Oregon, as compiled by W. Lair Hill,' said act having been filed in the office of the secretary of state February 21, 1893": Sp. Laws 1903, p. 793, c. 4, § 13. "All county roads lying within the limits of Nyssa are hereby declared to constitute a separate road district, to be under the supervision of an officer to be appointed by the common council, under such regulations as it may make, by ordinance, and all poll taxes or other taxes applicable to the improvement of said roads shall be paid to the city treasurer of Nyssa,

and shall be expended upon the order of said common council for the improvement of said roads": Sp. Laws 1903, p. 793, c. 4, § 14. "The territory included in the limits hereinbefore described shall be without the jurisdiction of the county court of Malheur County for the purpose of road taxes. * * ": Sp. Laws 1903, p. 794, c. 4, § 16.

Plaintiff contends that, under the charter provisions above cited, it is the duty of the county to pay over the moneys heretofore collected by it within its limits to the city treasurer. What the defendant's contention is does not appear, but we assume that it declines to pay over the money on the ground that Section 16 of Chapter 4 of the Charter of Nyssa is in violation of Section 23, Article IV, of the Constitution of Oregon. Those portions of said section referred to are as follows: "The legislative assembly shall not pass special or local laws in any of the following enumerated cases; that is to say. * * (7) For laying, opening, and working on highways, and for the election or appointment of supervisors. * * (10) For the assessment and collection of taxes for state, county, township, or road purposes." Provisions very similar to those under discussion were incorporated in the charter of East Portland: Session Laws 1872, p. 181. In *East Portland v. Multnomah County*, 6 Or. 62, it was held that the provision in said charter, taking away the jurisdiction of the county court to collect taxes within East Portland, was not in violation of Section 23 of the Constitution (Article IV). The provision in the East Portland charter went so far as to exempt entirely citizens of the municipality from the payment of road taxes to the county, and provided a fixed charge of \$4 upon each inhabitant between the ages of twenty-one and fifty to be expended on street improvement in lieu of road taxes. In the case of *Oregon City v. Moore*, 30 Or. 218 (46 Pac. 1017; 47 Pac. 851), the case of *East Portland v. Multnomah County*, 6 Or. 62, is cited and approved, and fol-

lowing these two cases we hold that the sections of the charter of Nyssa are not obnoxious to any provision of the constitution. This being the case, we are of the opinion that plaintiff was entitled to demand that portion of the money collected by the county for road taxes within the corporate limits of Nyssa.

The judgment will be reversed and the cause remanded to the lower court, with directions to overrule the demurrer.

REVERSED.

MR. JUSTICE KING took no part in this decision.

Argued May 6, decided July 20, 1909.

STATE v. OSBORNE.

[108 Pac. 62.]

CRIMINAL LAW—EXCLUSION OF PUBLIC FROM TRIAL—PRESUMPTIONS AS TO ENFORCEMENT OF ORDER AND PREJUDICE FROM ERROR.

1. In the absence of a showing to the contrary, it is presumed that an order excluding the public from the courtroom during a criminal trial was enforced, and that it was prejudicial to the rights of the defendant.

CRIMINAL LAW—TRIAL—EXCLUSION OF PUBLIC.

2. Under Section 11, Article I, Constitution of Oregon, declaring that, "in all criminal prosecutions the accused shall have the right to public trial," it was error for the court, in a prosecution for assault with intent to rape, to exclude from the courtroom all persons, except defendant, the attorneys engaged in the trial, the jury and officers of the court, and the witnesses while on the stand.

DISTRICT AND PROSECUTING ATTORNEYS—DUTIES OF PROSECUTING ATTORNEY.

3. It is as much the duty of prosecuting attorneys to see that a person on trial is not deprived of any of his constitutional or statutory rights as it is to prosecute him for the crime with which he is charged.

CRIMINAL LAW—TRIAL—STRIKING OUT OF EVIDENCE.

4. Hearsay evidence should be stricken out, though it was elicited on cross-examination by the parties objecting thereto.

CRIMINAL LAW—EVIDENCE—ACTS OF CODEFENDANT.

5. In a prosecution for an assault with intent to rape, the admission of evidence of a previous similar assault on the daughter of the prosecuting witness by a codefendant not on trial is reversible error.

WITNESSES—IMPEACHMENT—EVIDENCE.

6. After a witness has testified that the character of the prosecuting witness in a certain particular is bad, he will not be permitted on cross-examination to testify to specific acts or occupation of the prosecuting witness in rebuttal of such testimony.

CRIMINAL LAW—REVIEW OF APPEAL—HARMLESS ERROR.

7. A conviction will not be reversed for the giving of hearsay evidence which was not responsive to the questions asked, where the court instructed the jury not to consider it, and no prejudice therefrom appears.

CRIMINAL LAW—PRESUMPTION OF GUILT FROM FLIGHT.

8. The presumption of guilt arising from the flight of accused is one of fact, and not of law; and the question as to whether the circumstance tends to show a guilty intent is for the jury.

CRIMINAL LAW—FLIGHT AS EVIDENCE OF GUILT.

9. The flight of accused may be taken into consideration by the jury as a circumstance in connection with the other evidence in determining whether accused was guilty of the crime charged.

INSTRUCTIONS—DISCRETION OF COURT—REQUEST FOR—INCLUDED IN GENERAL CHARGE.

10. A court is not bound to give, and ought not to give, an instruction, even though it may state the law correctly, which is not couched in language sufficiently untechnical to be comprehended by the average juror, for by so doing the jury is confused rather than instructed.

From Malheur: **GEORGE E. DAVIS**, Judge.

The defendant, Heck Osborne, was indicted, tried and convicted of an assault with intent to commit rape. From a judgment sentencing him to the penitentiary for three years, he appeals. **REVERSED.**

For appellant there was a brief and oral arguments by *Mr. William H. Brooke* and *Mr. Francis M. Saxton*.

For respondent there was a brief and oral arguments by *Mr. John W. McCulloch*, District Attorney, and *Mr. Andrew M. Crawford*, Attorney General.

MR. JUSTICE KING delivered the opinion of the court.

Heck Osborne and Sam Yarbrough were jointly indicted on a charge of assault with the intent to commit rape upon Etta Van Blearicom, a woman over sixteen years old. Yarbrough pleaded guilty, and was sentenced to the penitentiary. At a subsequent term of court Osborne was tried, convicted, and sentenced to three years' imprisonment, from which he appeals.

1. After the case was called for trial, and before the taking of any testimony, the district attorney requested that the public be excluded, stating: "If the court please, before beginning the taking of testimony in this case, I

would like to ask for an order of the court excluding the public from the trial. It has a good deal of dirty, vulgar language to be used, and we can probably get at it better to have a closed-door session." Defendant's counsel objected to this request, but the court overruled the objection, and directed the sheriff as follows: "You will please exclude everybody from the courtroom except the defendant, the attorneys engaged in the trial of this case, the jury, and officers of this court, and the witnesses while on the witness stand; and you will observe this order so to exclude the public from the courtroom during the taking of testimony upon this trial." The making of this order constitutes the first prejudicial error assigned. It will be observed from the language of the court that the public was intended to be excluded. Whether this order was carried into effect the bill of exceptions does not disclose; but, in the absence of some showing therein to the contrary, it must be presumed that the order was enforced, and, if erroneous, that it was prejudicial to the rights of the defendant: *Inverarity v. Stowell*, 10 Or. 261; *Du Bois v. Perkins*, 21 Or. 189 (27 Pac. 1044); *Nickum v. Gaston*, 24 Or. 380 (33 Pac. 671: 35 Pac. 31); *State v. Morey*, 25 Or. 241 (35 Pac. 655: 36 Pac. 573); *Carney v. Duniway*, 35 Or. 131 (51 Pac. 192: 58 Pac. 105); *Carter v. Wakeman*, 45 Or. 247 (78 Pac. 362); *State v. Reed*, 52 Or. 377 (97 Pac. 627).

2. It is argued that the procedure complained of is in violation of the plain provisions of both our national and state constitutions. Upon this subject the Constitution of the United States (Amendment 6) provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining

witnesses in his favor; and to have the assistance of counsel for his defense." It seems to have been held that, so far as this provision of the national Constitution is concerned, it was not intended to limit the powers of the states in respect to their own people, but to operate on the national government only: *Spies v. Illinois*, 123 U. S. 131 (8 Sup. Ct. 22: 31 L. Ed. 80); *In re Sawyer*, 124 U. S. 201 (8 Sup. Ct. 482: 31 L. Ed. 402); *Brown v. New Jersey*, 175 U. S. 174 (20 Sup. Ct. 77: 44 L. Ed. 119). But, whatever the rule on that subject may be with reference to the national organic law on the subject, the constitution of our state is to the same effect: See Section 11, Article I, Constitution of Oregon. The courts have uniformly held not only that constitutional guaranties of an accused on trial for a felony cannot be set aside by the courts, but that they cannot be waived: *Hopt v. Utah*, 110 U. S. 574, 579 (4. Sup. Ct. 202: 28 L. Ed. 262); *Crain v. United States*, 162 U. S. 625 (16 Sup. Ct. 952: 40 L. Ed. 1097). To the effect that this rule with but few exceptions applies with equal force to statutory guaranties under such circumstances, see *State v. Walton*, 50 Or. 142 (91 Pac. 490: 13 L. R. A. (N. S.) 811); *State v. Walton*, 51 Or. 574 (91 Pac. 495), and numerous authorities there cited.

There can be no question as to the right of a court to exercise much discretion in excluding in rare instances a part of the public, such for example, as hysterical persons, or those who may be inclined to disturb the orderly progress of the trial, or the young during a class of trials that shock the sense of decency or degrade the public morals. Also, for obvious reasons, it has been held that a trial court may regulate the indiscriminate admission of persons of a known class who might by their conduct tend to embarrass the witness, or interfere with the due and orderly progress of the trial. Extreme cases have also arisen where it has been found necessary to exclude the greater part of the spectators. Of this class are the

cases of *People v. Kerrigan*, 73 Cal. 222 (14 Pac. 849), and *Grimmett v. State*, 22 Tex. App. 36 (2 S. W. 631: 58 Am. St. Rep. 630). In the latter case the trial was for rape where the witness under examination was a girl fourteen years old. Numerous persons throughout the audience persisted in laughing and in otherwise disturbing the proceedings, whereupon it was deemed necessary temporarily to clear the room in order to quiet such disturbance. In *People v. Kerrigan* the court excluded all except the officers, those concerned in the trial, and friends of the defendant, which action was upheld on appeal, but in *People v. Hartman*, 103 Cal. 242 (37 Pac. 153: 42 Am. St. Rep. 108), this holding was impliedly overruled. The procedure in the *Kerrigan* and *Grimmett* cases was approved on appeal only because the record did not show that the defendant's rights were prejudiced thereby; the appellate court holding that the burden was upon the defendant to show injury by reason of having been deprived of a public trial. On this subject, in *People v. Hartman*, 103 Cal. 245 (37 Pac. 154: 42 Am. St. Rep. 108), the court observes: "These intimations cannot be indorsed. The defendant charged with crime is entitled to certain rights under the constitution, and, when he has been deprived of any one of them, he has not had that fair and impartial trial to which he is entitled, however bad and degraded." In *People v. Hall*, 51 App. Div. 57 (64 N. Y. Supp. 433); *State v. Callahan*, 100 Minn. 63 (110 N. W. 342) and *Benedict v. People*, 23 Colo. 127 (46 Pac. 637), the courts appear to recognize the practice followed in the *Kerrigan* and *Grimmett* cases; but whatever may be the reasons assigned for the concussions announced, or the distinctions attempted between those cases and the great weight of authority, the rule there applied can have no application in this state: *Carter v. Wakeman*, 45 Or. 427, 430 (78 Pac. 362). In *People v. Murray*, 89 Mich. 276, 290 (50 N. W. 995: 14 L. R. A. 809: 28 Am. St. Rep. 294), the court in dis-

tinguishing the case of *People v. Kerrigan* from the one under consideration says: "Neither is this case an authority for what was done in Murray's case. The court did not order the courtroom to be cleared of spectators, but the lobby outside. There is nothing in the facts of that case which assimilates in any degree to the trial of Murray. Here no violence is shown, no disorderly conduct, no violent or disgraceful action on the part of Murray, which tended to lessen the dignity of the court, or bring the administration of justice into disrepute. I cannot accede to the correctness of the proposition intimated in that case that, if a public trial has not been accorded to the accused, the burden is upon him to show that actual injury has been suffered by a deprivation of his constitutional right. On the contrary, when he shows that his constitutional right has been violated, the law conclusively presumes that he has suffered an actual injury. I go further, and say that the whole body politic suffers an actual injury when a constitutional safeguard erected to protect the rights of citizens has been violated in the person of the humblest or meanest citizen of the state. The constitution does not stop to inquire of what the person has been accused or what crime he has perpetrated, but it accords to all without question, a fair, impartial, and public trial. * * Who is to decide who are the friends of the accused? The law makes no such test, but allows all citizens freely to attend upon any trial, whether civil or criminal." After the appellate court had held that the public must not be excluded, the legislature of Michigan passed an act permitting trial courts in certain cases to exclude the public, but in *People v. Yeager*, 113 Mich. 228 (71 N. W. 491), this legislative enactment was held unconstitutional.

3. The cogent reasons above given for not requiring the defendant on appeal to show that he was actually prejudiced on account of the court's invasion of his constitutional rights may be further supplemented. The

very fact that a defendant is tried in the absence of the public, or, in other words, that the trial was secret, might in many instances deprive him of the power of showing that he has not had a fair trial. This in itself might result in the affirmance of a judgment of conviction which may have been secured in an unjust and illegal manner. With an audience present it is always within the power of the accused or of his counsel to call upon the persons present to witness unbecoming language or conduct of counsel, or of the court, or of others connected with the trial, of which privilege he would be precluded in the absence of such an audience. It often happens that disputes arise between the court and counsel, such, for instance, as where the court refuses to recognize exceptions taken, whereupon it becomes necessary that bystanders be called upon to evidence what occurred—and this under our present system where secret trials are practically unknown: Section 170, B. & C. Comp. How much more, then, would be the occasion—and we might add the inducements—for incidents of this kind to occur if, by the establishment of the precedent which an affirmance of this case would necessitate, the constitutional guaranties of public trial should become obsolete, and trial courts be permitted at their will to exclude the public. It will not do to say that courts are impartial, and that both the courts and district attorneys are there to protect the accused from wrong as well as to convict the guilty. The law is intended not only for protection against the acts of those who knowingly or intentionally err, but against those as well who do wrong unintentionally, or from an erroneous sense of duty. As stated by the Supreme Court of Michigan in *People v. Murray*, 89 Mich. 276, 286 (50 N. W. 995, 998; 14 L. R. A. 809; 28 Am. St. Rep. 294): "It is for the protection of all persons accused of crime—the innocently accused, that they may not become the victim of an unjust prosecution, as well as the guilty, that they may be awarded a fair

trial—that one rule must be observed and applied to all.” Courts as a rule are just, and seldom do wrong intentionally, but it must be remembered that the members thereof are human, and accordingly likely to err. It is as much the duty of prosecuting attorneys to see that a person on trial is not deprived of any of his statutory or constitutional rights as it is to prosecute him for the crime with which he may be charged, but it is a matter of common knowledge, and every practitioner at the bar will bear witness that the district attorney who fully appreciates and practices this self-evident duty is a rare exception rather than the rule. In practice he is usually as enthusiastic to add one more conviction to his string of legal conquests as the counsel for defense may be to clear his client; and equally in such instances, in the extremes followed, do we, as a rule, observe no difference between the methods adopted by the prosecution and those of counsel defending. In the early history of the law, when the accused was not permitted to say anything in his own defense, or to be represented by counsel, the public prosecutor as well as the courts, it would seem, should have fully appreciated their duties in this respect; but the flagrant abuses extant in England, as well as in this country, prior to our Revolution, impressed upon the founders of our national and state governments the importance of providing against them by inserting in our fundamental laws the express provision that every person charged with crime shall have a public trial. The language used for this purpose is specific, clear, and free from any possible misunderstanding. In the face of the adoption of these explicit provisions on the subject, it would be an anomaly upon judicial interpretation to establish a precedent the logical sequence of which when judged by past events would soon result in undermining and annulling the constitutional guaranties so carefully guarded and provided for by the founders of our national and state governments. It needs but a moment’s reflec-

tion to be able to conceive of many ways in which a prisoner deprived of the presence of the public might be injured. In the first place, the mere declaration that the public shall be excluded tends to impress the jury with the enormity of the offense for which the accused is to be tried, carrying with it, to some extent at least, prejudice against the person so charged. It is not an unusual occurrence that some person in an audience attending a trial will upon hearing a narrative of the incidents connected with the crime charged, recall facts to which he will call attention, and thus aid in establishing the innocence of the accused. Were the public excluded, however, such aid would not be available, and the conviction of the innocent might result. Again, the presence of friends of the accused often serves to impress the jury favorably, and to that extent, at least, counteract the prejudice usually incident to being accused of an offense which the court may think the public should not hear. It cannot, therefore, be said that the court at all times may exclude any particular class. Its regulations in this respect must be reasonable and be governed by the surrounding circumstances. If a woman is on trial, or constitutes one of the principal witnesses, it may be important that persons of her own sex should be present. If a child is to testify, occasions may arise when the playmates and friends of similar age to such witness should be present to enable the court and jury to elicit from that witness the testimony to which the defense or prosecution is entitled.

In referring to a trial identical, so far as procedure is concerned, with the one here under consideration, Mr. Justice Garoutte, in *People v. Hartman*, 103 Cal. 243 (37 Pac. 154: 42 Am. St. Rep. 108), observed: "This was a novel procedure, and has no justification in the law of modern times. We know of no case decided in this country supporting the course of procedure here pursued. It is in direct violation of that provision of the constitu-

tion which says that a party accused of crime has a right to a public trial. The fact that the officers of the court were allowed to be present in no way made the trial public. For the purposes contemplated by the provision of the constitution the presence of the officers of the court, men who, it is safe to say, were under the influence of the court, made the trial no more public than if they too had been excluded. While a right to the public trial contemplated by the constitution does not require of courts unreasonable and impossible things, as that all persons have an absolute right to be present and witness the court's proceeding, regardless of the conveniences of the court and the due and orderly conduct of the trial, yet this provision must have a fair and reasonable construction in the interest of the person accused. Judge Cooley, in his work upon Constitutional Limitations, p. 383, has well declared the true rule in the following language: "The requirement of a public trial is for the benefit of the accused, that the public may see that he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility, and to the importance of their functions; and the requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who could only be drawn hither by a prurient curiosity, are excluded altogether.'" To the same effect: 40 Cent. Law J. 7; Bishop's Criminal Procedure, § 957; *Hill v. People*, 16 Mich. 351; *Williamson v. Lacy*, 86 Me. 80 (29 Atl. 943: 25 L. R. A. 506); *State v. Hensley*, 75 Ohio St. 255 (79 N. E. 462: 9 L. R. A. (N. S.) 277: 116 Am. St. Rep. 734). In *Williamson v. Lacy*, Mr. Chief Justice PETERS, in considering the effect of excluding the public from trials, remarks: "History brings to us too vivid pictures of the oppressions endured by our English ancestors at the

hands of arbitrary courts ever to satisfy the people of this country with courts whose doors are closed against them. They instinctively believe that it is their right to witness judicial trials and proceedings in the courts. It is true that courts have discretionary powers to be exercised in such a matter—but not an unlimited discretion. The almost boundless authority exercised by the court of Star Chamber in England was the seed of its own destruction, and was its historical infamy. Its lessons are not lost on the courts of today. We never knew of any court of general jurisdiction in this state conducting a strictly private criminal trial, nor, before this, of such a trial before a common magistrate.” We do not doubt but that in the case before us the court as well as the district attorney acted with the best of motives, having in view that the trial would move along more agreeably without the presence of spectators, and with equally as much fairness to all concerned as with them, and that in anticipation of the language usually incident to such cases the public would fare better outside of the courtroom than if present; but whatever may have been the purpose, whether out of respect for the public in this particular case, or whether for the purpose, as suggested by the language used by the state’s counsel in his request, that with a closed-door session “we can get at it better,” or otherwise, it must be conclusively presumed by this innovation to be prejudicial to appellant’s rights, by reason of which a reversal becomes necessary.

4. In view of a new trial, a determination of other points presented becomes important. John H. Howard, a justice of the peace and a witness for the state, on cross-examination testified as to the time the appellant returned, and was asked:

“He didn’t tell you that, did he?”

“A. Oh, no.”

“Q. That is your opinion about it?”

“A. Yes; and I don’t know as it would do any good for me to tell this, but a man working up in the field

right above town there, and he told him to come in and make a good talk to me, and I would let him go."

"Q. How did you know this man told him that?"

"A. Well, the man told me he did."

Defendant's counsel then moved that this testimony be stricken out as hearsay, which was denied; the court observing: "You are bringing that out." This ruling is assigned as error. That this was hearsay testimony is not open to question; the point involved in reference thereto being whether the defendant was entitled under the circumstances under which the answers were elicited to have this hearsay testimony taken from the jury. The testimony elicited on cross-examination is the evidence of the adverse party: *Ah Doon v. Smith*, 25 Or. 89, 93 (34 Pac. 1093). The questions asked the witness were clearly within the defendant's rights, and that the hearsay responses were elicited on cross-examination forms no exception to the rule in this respect. The witness was not interrogated in such a manner as to require him to give hearsay testimony further than, if it should develop that his information was acquired in that manner, defendant's counsel would be apprised of that fact, and to this information they were certainly entitled. It would be a novel procedure which, after a witness has testified that he knows a fact, would preclude the counsel from ascertaining the source of his information without the danger of being compelled to admit testimony that is hearsay, and accordingly incompetent, merely because elicited on cross-examination. We know of no authority for this practice. The motion to take from the jury the testimony complained of should have been granted.

5. Evidence was offered tending to show that at the time the assault charged was committed Yarbrough, in company with appellant, was visiting the home of the prosecuting witness, and at that time Elsie Van Blearicom, a daughter of the prosecuting witness, was in an adjoining bedroom. Elsie was then called, and over

defendant's objection testified that on the night before, she was assaulted in a similar manner by the co-defendant, Yarbrough, who was not then on trial, but had previously pleaded guilty to the charge under consideration, and that as a result of the assault she had marks on her throat and neck on the following day. Nothing appears in the record which would in any way show this testimony to be relevant or competent. It had no bearing whatever upon the crime for which either of the defendants was charged further than that it might affect Yarbrough if he were on trial. Certainly Osborne could not be held for the acts of his co-defendant on some previous occasion in what might constitute a separate and distinct crime which was in no manner connected with the one before the court. This testimony should have been excluded. Its admission constitutes reversible error.

6. The next error complained of relates to the cross-examination of Frank Cummings. On direct examination he testified as to his residence; that he was acquainted with the general reputation of the prosecuting witness for virtue and chastity in the vicinity in which she lived, and that it was not good. On cross-examination by the state he was asked if he knew anything personal against her reputation, and if he ever saw "any suspicious circumstances or anything outside of talk" which he had heard to convince him that her reputation was not good, which he answered in the negative. The witness was then interrogated concerning her occupation, as to whether he knew she was washing at a hotel, and if she appeared to be a hard-working woman, to all of which questions answers were made over defendant's objection as being incompetent, immaterial, irrelevant, and not proper cross-examination. Some authorities appear to hold that a person testifying as to character may be questioned concerning the specific acts and habits of wrongdoing on the part of such a person. The weight

of authority, however, is to the contrary. See 3 Enc. Ev. 49, and authorities collated pro and con on the subject; also Wigmore, Ev. § 988, where this rule is severely criticised. While this practice has been permitted in some jurisdictions, we know of no authority or of any just reason for a rule which after a witness has testified that the character of another in a certain particular is bad permits specific acts to be shown on cross-examination for the purpose of rebutting such testimony. The reason for this is obvious. A few bad acts, and sometimes one, in the community where committed, may give to the actor a bad reputation, while a thousand good ones may be shown without overcoming such rumors. A witness may on such occasions be cross-examined as to the grounds of his opinion, as to his acquaintance with the other person and his opportunities for acquiring information, as to the number and names of persons he has heard speak of him, and what they said, as to how long and how generally favorable or unfavorable reports have prevailed, as to his contradictory statements of opinion, and as to the particular trait for which the reputation of the other person is good or bad; but he should not be permitted to show specific acts or occupations concerning which the witness has not been interrogated on direct examination: 3 Enc. Ev. 47; Wigmore, Ev. § 1112, subd. 3. The testimony of this witness was hearsay and not proper cross-examination.

7. The testimony of B. C. Richardson, county judge, concerning which error is alleged, was also hearsay and under no circumstances admissible. His answers, however, were not responsive to the questions propounded; hence in the first instance could not well have been kept from the jury, and, the court on its own motion having instructed the jury not to consider any of the testimony given by this witness, we are of the opinion that prejudicial error cannot be predicated on its admission.

8. The testimony disclosed that, after appellant was placed under bonds to await the action of the grand jury, he left the country and was rearrested and returned, in reference to which the court said to the jury: "The flight of the defendant after having given bail to appear is a circumstance you may consider as tending to show guilty intent as charged"; and refused to give on the subject an instruction requested by the defense that "Flight is no evidence of guilt, but a circumstance which you may consider." Neither the instruction as given nor the one requested is proper. The error lies in the court assuming a fact to be established, which is entirely for the jury. The presumption of guilt arising from the flight of an accused, although but slight, is one of fact, and not of law, being a circumstance only, and the question as to whether the circumstance may tend to show a guilty intent is for the jury. As remarked by the court in *Ryan v. People*, 79 N. Y. 593, 601: "The evidence that the defendant made an effort to keep out of the way of the sheriff was very slight, if any, evidence of guilt. There are so many reasons for such conduct consistent with innocence that it scarcely comes up to the standard of evidence tending to establish guilt, but this and similar evidence has been allowed upon the theory that the jury will give it such weight as it deserves, depending upon the surrounding circumstances."

9. The court might properly have instructed that the flight of the defendant, if established, may be taken into consideration by them as a circumstance with other evidence adduced in determining whether the accused was guilty of the crime charged. Mr. Justice BEAN states the rule thus: "The competency of such evidence is one thing, and what it shows or tends to show is another and quite a different thing. The former is a question for the court, and the latter exclusively for the jury": *State v. Maloney*, 27 Or. 53, 55 (39 Pac. 398, 399). Cases involving this question are analogous to those in which

a person is charged with larceny and found in possession of the alleged stolen property. In such cases it is settled that such possession when established is only a fact which may be considered by the jury, and from which, when taken in connection with other circumstances, they may infer guilt. This circumstance, standing alone, is not sufficient to warrant a conviction: 12 Cyc. 395; *State v. Lee Hale*, 12 Or. 352 (7 Pac. 523); *State v. Maloney*, 27 Or. 55 (39 Pac. 398); *State v. Pomeroy*, 30 Or. 25 (46 Pac. 797); *State v. Sally*, 41 Or. 370 (70 Pac. 396); *State v. Hodge*, 50 N. H. 510; *Hickory v. United States*, 160 U. S. 408 (16 Sup. Ct. 327: 40 L. Ed. 474); *Alberty v. United States*, 162 U. S. 499 (16 Sup. Ct. 864: 40 L. Ed. 1051).

The other errors assigned relate to the giving by the court of instruction No. 10 defining "impeachment," and in refusing to give certain instructions requested by the defense. The instruction as given, while standing alone, would not constitute reversible error, but, like some instructions requested by the defense and refused by the court, is subject to the criticism suggested in *Russell v. Oregon R. & N. Co.*, 54 Or. 128 (102 Pac. 624), with reference to which Mr. Justice MCBRIDE observes: "Unless an instruction is so definite as to enable a man of average intelligence to understand it, it ought to be refused as misleading and tending to confuse rather than instruct a jury. A court is not bound to give, and ought not to give an instruction, even though it states the law correctly, which is not couched in language sufficiently untechnical to be comprehended by the average juror. Requests for instructions are permitted so that the jury may be fully informed as to the law, and not to enable litigants to ensnare an unwary court into technical error which will secure reversal in case of defeat."

Subject to the above suggestion, the requested instructions, with the exception of No. 10, and the last requested in reference to testimony of children, the giving of which

was discretionary with the court, were proper. Much of the substance of the requested instructions, however, was included in the general charge. Defendant's requested instruction No. 7 would be proper under some circumstances, but sufficient evidence does not accompany it to enable us to determine whether it is applicable to the case under consideration.

The judgment of the court below is reversed, and a new trial ordered.

REVERSED.

Argued May 6, decided July 30, 1909.

NAYLOR v. MCCOLLOCH, MAYOR.

[108 Pac. 68.]

MUNICIPAL CORPORATIONS—CONSTRUCTION OF SEWERAGE SYSTEM—CONTRACTS—"ETC."

1. A contract for the construction of a sewerage system, stipulating that the city may pay for the work in legally issued bonds, or in cash out of the general fund, as it may elect, but that the city shall "pay for any readvertising, etc., required to satisfy the attorney" of the contractor that the bonds are legally issued, requires the contractor to accept legally issued bonds, and not to merely accept such bonds as his attorney shall advise him are legally issued; and, where such attorney assumes that it is impossible to issue any valid bonds in any way, the contractor cannot refuse to perform because of the failure of the city to pay the cost of advertising, etc., required to satisfy the attorney of the legality of the bonds; the term "etc." meaning other things of like character.

MUNICIPAL CORPORATIONS—POWERS.

2. Municipal corporations have no powers except such as are granted in express words by their charters, or such as are necessarily implied from those so granted, or those essential to the declared objects and purposes of the corporation.

MUNICIPAL CORPORATIONS—CONSTRUCTION OF SEWERAGE SYSTEM—PAYMENT—BONDS—SPECIAL ASSESSMENTS.

3. Sumpter City Charter (Sp. Laws 1901, p. 95), authorizing the levy of a special tax for any specific city purpose, and to issue bonds for any specific purpose, empowering the city to construct sewers, the cost of which is to be assessed to the property benefited, and setting forth a complete system for constructing sewers by assessments, etc., authorizes the city to issue bonds for the construction of a sewerage system, or to levy an assessment on property benefited, to pay for the cost thereof; a sewer being a specific city purpose.

MUNICIPAL CORPORATIONS—PAYMENT OF CLAIMS—POWERS.

4. Under Sumpter City Charter (Sp. Laws 1901, p. 95), providing that demands which the council shall pay shall be for corporate purposes, and none other, the council has no power to order the payment to a contractor of money forfeited to the city because of the contractor's failure to perform his contract; the claim for repayment not being for a corporate purpose.

MUNICIPAL CORPORATIONS—DEMANDS—PAYMENT—POWER OF MAYOR.

5. Sumpter City Charter (Sp. Laws 1901, p. 96), declaring that the mayor is the chief executive, and must exercise supervision over the general affairs of the city and subordinate officers, requires the mayor to refuse to sign a warrant for the payment of money illegally ordered by the council.

TRIAL—FINDINGS—SUFFICIENCY.

6. Where, in an action involving the construction of a contract, the court made the contract a part of its findings, and found in the terms of the contract what the parties agreed to do, a more specific finding would only be a conclusion of law from the facts found, and would be unnecessary.

EVIDENCE—JUDICIAL NOTICE—CHARTERS OF MUNICIPAL CORPORATIONS.

7. A charter of a city is a public law of the state of which the courts take judicial notice.

TRIAL—FINDINGS—SUFFICIENCY.

8. Where the court found on issues ultimately determining the controversy and necessarily supporting the judgment, other issues became immaterial.

From Baker: WILLIAM SMITH, Judge.

This is a mandamus proceeding instituted by the plaintiffs, A. L. Naylor and Charles Norlin, against C. H. McCulloch, as mayor of the city of Sumpter, Oregon, to compel him to sign a certain city warrant for the sum of \$600 drawn upon the treasurer of said city, which warrant was ordered issued by the city council of said city.

AFFIRMED.

For appellant there was a brief over the names of *Messrs. Hart & Nichols*, with an oral argument by *Mr. Julius N. Hart*.

For respondent there was a brief over the names of *Messrs. McCulloch & McCulloch* and *Messrs. Butcher, Clifford & Correll*, with oral arguments by *Mr. Charles H. and Clyde McCulloch*.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

1. This cause comes to this court on appeal from a judgment of the circuit court of Baker County refusing to compel defendant, as mayor of the city of Sumpter, to sign a warrant for the sum of \$600, the payment of which was directed by vote of the city council. The evidence tends to show that on June 21, 1904, plaintiffs entered

into a written contract with the city of Sumpter to construct a sewerage system for the city, according to certain plans and specifications, which are not on the record, but which from the testimony appear to be sufficiently comprehensive to ultimately accommodate the entire or a great portion of the city. Plaintiffs were to be paid \$15,000 on the whole contract, payments to be made monthly, as the work progressed and was measured, the city to retain 25 per cent until final completion of the entire system. Plaintiffs were to begin work on or before July 7, 1904. It was agreed that the city might pay for the work in legally issued city bonds, or in cash, out of the general fund, as it might elect. The contract also contained a clause couched in the following language: "The city of Sumpter to pay for any readvertising, etc., required to satisfy the attorney of said second parties, that said bonds are legally issued." Plaintiffs also agreed to deposit a certified check for \$1,000, to be forfeited should they fail to perform their contract. By a course of negotiations, not necessary to detail in this opinion, the amount was finally reduced to \$600, and on July 19, 1904, plaintiffs not having begun work as agreed upon, the council declared the deposit forfeited, and directed the recorder to cash the check and turn the money into the general fund of the city, which he did. It is a fair deduction from this statement that the plaintiffs were in default, and that the forfeiture was proper, unless the city of Sumpter had defaulted in some particular as to its part of the contract, and plaintiff contends that the city was in default, in that it had made no legal provision for payment for the work in city bonds, or otherwise, and had failed to satisfy their attorney that the bonds, which it proposed to issue, were legal or valid bonds. The fact seems to be that plaintiffs' attorneys had advised them that the proposed bonds were invalid and worthless, and that under the charter of the city it could not pay for sewerage improvements out of

the general fund, or out of the sale of bonds, or in any other way than by assessments on abutting property.

We do not agree with plaintiffs' contention that the clause in the contract, requiring the city to pay certain expenses required to satisfy the attorney of the legality of the bond issue, absolved plaintiffs from the results of a forfeiture. The contract of plaintiffs is to accept legally issued bonds—not accept bonds which his attorney should advise him were of such a character. Such a construction would furnish a contractor a very easy method of evading a contract, as it would not be difficult to find an attorney who might advise a client in an emergency that any sort of a bond issue was illegal. Nor do we think that a fair construction of this clause leaves to the attorney the decision of the question as to the primary right of the city to issue bonds for the purpose proposed, but in any event was only intended to give him a sort of a general supervision of the manner in which the issue should be made. The city was to “pay all cost of advertising, etc., required to satisfy the attorney of the legality of the bond issue.” Now if the character “etc.” has any meaning in a contract, which is doubtful, it can only mean “and others”; that is, other things of like character to the thing specified, namely, advertising, and such other details of the issue as would make bonds, which both parties must have assumed that the city had a right organically to issue, good and valid. If the city had no right under its charter to issue bonds for the improvement, under any circumstances, then no amount of advertising and no moneys worth of “etc.” could remedy this defect, and we will not assume that the parties were intending to contract for an absurdity. There are abundant authorities which hold that the character “etc.,” used as it is in this contract, is meaningless: *Harrison v. McCormick*, 89 Cal. 327 (26 Pac. 830; 23 Am. St. Rep. 469); *Myers v. Dunn*, 49 Conn. 71; *Whitmore v. Bow-*

man, 4 G. Greene (Iowa) 148; *State v. Wallichs*, 12 Neb. 407 (11 N. W. 860).

2. In this case, taking into consideration the context, we are disposed to hold that the particular phrase under consideration should be interpreted to mean, "advertising and other things of like character." Now the city of Sumpter was never called upon to do any specific thing to make its bonds valid, or to satisfy the attorney that they were valid. It seems to have been assumed by him that it was impossible that validity could be imparted to them by any act which the city could perform. Hence, as they were not called upon or required to do any specific thing, they were not in default, unless the bond issue was, in fact, void, and to that question we will now devote our attention. At the outset it may be stated, as an elementary proposition, that municipal corporations have no powers except such as are granted in express words by their charters, or such as are necessarily implied from those so granted, or those essential to the declared objects and purposes of the corporation: 1 Dillon, *Municipal Corporations*, § 89; Tiedeman, *Municipal Corporations*, § 110; 1 Beach, *Public Corporations*, § 538; *MacDonald v. Lane*, 49 Or. 530 (90 Pac. 181).

3. With the foregoing definitions and limitations of municipal power in view, we will now examine the provisions of the city charter of Sumpter, in order to determine whether, among the powers granted or implied in its charter, or necessarily essential to the declared objects of its incorporation, there exists the power to construct a sewer system for the city, and to pay for it out of the general fund, or by bonding the city. Section 31 of the charter (Sp. Laws 1901, p. 101) authorizes the levy of a special tax of not to exceed 10 mills for any specific object within the authority of the corporation, in addition to a general tax of a like amount for general municipal purposes. Subdivision 5 of the same section authorizes the city to issue bonds "for any specific purpose,"

and further provides as follows: "Whenever the city of Sumpter shall contemplate the issuance of bonds for any improvement under this act, the council shall, by ordinance, direct the manner in which the estimate of the cost of such improvements shall be ascertained." Following this are provisions for making and filing the estimate, submitting the question to a vote of the taxpayers, and other matters not necessary to enumerate. In subdivision 17 of the same section is found authority, among other things, for the construction, cleaning, and repairing of streets, crosswalks, alleys, gutters, and sewers, and in subdivision 47 there is granted general authority "to exercise all such power as may be given to the council by this act, and such additional power and authority as may be necessary and proper to carry into effect the provisions of this act, and to pass all ordinances necessary therefor." From these provisions it will be seen that the power to construct sewers is specifically granted, and it will not be questioned that constructing a sewer is a "specific city purpose," so, if we proceeded no further, it would follow, as a natural consequence, that the city has authority to build a sewer system and pay for it with bonds, if the taxpayers sanction such action by their votes. But there are other provisions of the charter which it is contended are of controlling force, in reference to the construction of sewers, and which, by prescribing a method of improvement by assessment on abutting property, exclude by implication any other method.

4. Section 92 of the charter provides "that the council shall have power to * * improve a street, or any part thereof * * and to lay all necessary sewers or drains. The power and authority to improve a street includes the power and authority to order the whole, or any portion, either in length or width, of the streets * * of the city of Sumpter, to be graded, or regraded, planked or replanked, paved or repaved, macadamized or remacadam-

ized * * and to order sidewalks, gutters, sewers, manholes * * to be constructed, repaired, or kept in repair; and to order any work to be done therein which may be necessary to complete the whole or any portion of said streets, avenues, lanes or alleys * * or for the construction of any sewer or drain therein. * * Provided, however, and it is hereby expressly enacted, that neither the city of Sumpter, nor any officer thereof, shall be liable for any portion of the cost or expense of any street work, improvement, or the construction or repair of any sewer or drain, by reason of the delinquency of the person, persons, or property assessed for the payment of said work * * or by reason of the inability of said city of Sumpter to collect assessments levied for the payment of such work, improvement, sewer or drain, as aforesaid, and no moneys shall ever be paid out of the general fund of the city on account of any such work * * but the contractors doing such work shall look solely to the property affected by such work and the owners thereof, *unless at the time the improvement is ordered the council shall expressly provide, by ordinance, that some portion thereof shall be paid out of the general fund.*" We italicise the exception in the above section to call attention to the fact that, while it and several subsequent sections contain an elaborate system of street improvement by assessment of abutting property, there is still an indication of a legislative intent to leave the city free to improve by drawing on the general fund for that purpose, if such a course should be deemed advisable.

Sections 128 to 137, inclusive, deal exclusively with the subject of sewers and drains, and provide a method of constructing them by assessment on property benefited. The grant of authority already twice given in preceding sections is reiterated in Section 128 in the following language: "The council shall have the power to cause to be constructed and laid down all sewers and drains, with all necessary manholes, lampholes, catchbasins and

branches, and to repair or relay the same whenever it may deem that the public health, interest, or convenience may require the same, and to assess the cost thereof on the property benefited directly or indirectly by such sewer or drain, or the repair of the same in the manner hereinafter provided." Section 129: "Before the construction, laying, or relaying of any sewer or drain shall be authorized, *the cost of which is to be assessed to the property benefited,*" etc.—after which follows a complete system for constructing sewer by assessment. We again call attention to the italicised portion of the section last cited, which indicates that other methods than that of assessing benefited property may be employed. To sum up, in section 31 is found the power to levy a tax for any specific city purpose. In subdivision 5 of the same section is found the power to issue bonds for a like purpose, and in subdivision 17 is found unlimited authority to construct sewers. We have a case, then, where an unlimited authority is given, and we think the subsequent sections, providing for assessment upon property benefited, are only added out of abundant caution, so that if the city should choose to pursue the latter method, all the machinery would be provided to make it effective. We think the language used in the subsequent sections indicates that it was not the legislative intent to make the assessment method the exclusive one, and that the words "the cost of which is to be assessed on the property benefited" clearly indicate that the legislature intended to permit other methods to be used, and not an intent to limit an authority already expressly granted without limitation. This being the case, the plaintiffs were in default, and the council acted within its rights when it declared the \$600 forfeited. The moneys, having been thus rightfully turned into the treasury, the council had no authority to order it repaid to the plaintiffs, as they could only appropriate money to pay some legitimate claim against the city.

5. Section 60 of the charter reads as follows: "All demands and accounts against the city shall be presented to the recorder, with the necessary evidence in support thereof, and he shall report them to the council at its next meeting after being so presented to him, together with any suggestions and explanations which he may deem proper and pertinent. All such demands and accounts shall lie over from the meeting at which they were presented until the next regular meeting, when the council shall vote direct whether the same shall be paid in whole or in part, as they may deem just and legal. Provided, the same be for corporate purposes and none other." Plaintiffs failed to comply with this section in several particulars: (1) The demand was not presented to the recorder; (2) no evidence in support thereof was presented, and in addition the claim was illegal, and the attempted appropriation was not for a corporate purpose, but was a mere gift. The above-cited provisions of the charter being in the interest of the general public, and a matter of positive law, it is difficult to see how the council could waive it; neither could they waive the fact that the claim was one they had no right to pay in any event, and their action in ordering it paid was a violation of the charter and void: *Richardson v. Salem*, 51 Or. 125 (94 Pac. 34), and cases there cited. We do not think that the mayor of Sumpter is a mere ministerial officer and an automaton of the council. Section 48 of the charter is as follows: "The mayor is the chief executive of the municipal corporation and must exercise a careful supervision over its general affairs and subordinate officers"—and we think that when, in the course of general supervision, he found that the council had illegally ordered a warrant drawn, it was his duty to refuse to give it a currency which might mislead possible innocent purchasers into the belief that it was for the payment of a legitimate claim: *Richardson v. Salem*, supra; *Chalk v. Mayor of White*, 4 Wash. 156 (29 Pac. 979); *James v.*

Seattle, 22 Wash. 654 (62 Pac. 84: 79 Am. St. Rep. 957).

6. We find no error in the findings of fact made by the court below. It is urged that the court erred in failing to find on certain material issues in the writ, and we will briefly consider these assignments: Assignment No. 16 is as follows: "The court erred in refusing to find the following allegation of the writ to be true: 'That on or about the 21st day of June, 1904, plaintiffs herein entered into a written contract or agreement with the city of Sumpter, by its mayor and recorder, by order of its council for the building of a sewer system in the city of Sumpter.' That said contract, among other things, provided that plaintiffs should take in payment for the construction of said sewer, legally issued bonds of the city of Sumpter, the city reserving the right to pay for such work in cash instead of in bonds, and said contract further provided, in effect, that said city should do everything that might be demanded by plaintiffs to satisfy the attorney of plaintiffs that said bonds were legally issued; the question of the legality of said bonds being left by said contract for determination to the attorney for plaintiffs. And the court erred in refusing to make any finding as to the issue raised by said allegation." The court did not find directly and in terms upon this issue, but made the contract itself a part of its findings, so that it found in the very terms of the contract just what the parties did agree to in this respect. A further and more specific finding would have been only a conclusion of law from the facts found, and we think the finding sufficient.

7. Assignment No. 17 relates to the refusal of the court to find upon certain provisions of the charter of the city of Sumpter. The charter is a public law of this state of which all courts take judicial notice, and it was not necessary for the court to make a finding upon it.

8. Assignment No. 18 relates to the refusal of the court to find that the city had failed to comply with the contract on account of its bonds being illegal and worthless.

The contract, as we have said before, is made a part of the court's finding, and whether the city had failed to comply with it depended upon the construction of the contract taken in conjunction with the city charter, and arises as a legal conclusion from the facts contained in the findings and the construction of a public statute. In the absence of a request for a more specific finding we think the matter sufficiently covered to support the judgment.

Assignment No. 19 relates to the refusal or failure of the court to find that plaintiff demanded the return of the \$600, and proposed that, if it would do so, he would release it from further liability on the contract. There was only one legal way for plaintiffs to demand their money, and that was by presenting their demand, with the proper evidence thereof, to the recorder, which is not alleged. The allegation as it stands is not material.

Assignment No. 20 relates to the refusal of the court to find the following allegation of the writ to be true: "That by the adoption of such report and recommendation the city of Sumpter entered into a contract with plaintiffs for the return of said sum of \$600 upon plaintiffs signing the release mentioned in said report and recommendation, and in said proposal of said plaintiffs," and in refusing to find upon said allegation. The allegation was, in its essence, a mere statement of a conclusion of law, namely, that by a certain action of the city council, and the signing of a certain paper by plaintiffs, a contract arose by operation of law. The allegation was not material, and no error was committed by the court in refusing to find upon it. The same may be said of the next assignment.

If there had been no finding on any of the matters embraced in the assignments of error just mentioned, we still think that, in the absence of specific requests for such findings, the failure to find would not be reversible error. The court found on issues that ultimately de-

terminated and necessarily supported the judgment rendered, and the other issues in the case, therefore, become immaterial: *Lewis v. First National Bank*, 46 Or. 182 (78 Pac. 990); *Freeman v. Trummer*, 50 Or. 287 (91 Pac. 1077).

From the conclusions here reached, it follows that the judgment of the court below must be affirmed.

AFFIRMED.

Argued May 7. decided July 20, 1909.

STATE v. PARR.

[108 Pac. 484.]

ROBBERY—INDICTMENT AND INFORMATION—INDICTMENT—ASSAULT WITH INTENT TO ROB.

1. Section 1768, B. & C. Comp., provides that "If any person, being armed with a dangerous weapon, shall assault another, with intent, if resisted, to kill or wound the person assaulted," and shall rob or take from the person assaulted any money which may be the subject of larceny, such person, upon conviction thereof, shall be punished. 1 B. & C. Comp., p. 750, prescribes as a form of indictment for an assault with intent to kill if resisted that "being armed with a dangerous weapon did commit an assault upon one O. D. with intent, if resisted, to kill or wound the said O. D., and then and there feloniously took," etc. Section 1806, B. & C. Comp., declares that an indictment must be direct and certain as regards the particular circumstances of the crime charged when necessary to constitute a complete crime, and Section 1805 provides that the manner of stating the act constituting the crime as set forth in the appendix to the Code is sufficient in the cases where the forms there given are applicable. Held that, in charging an assault and robbery with intent, if resisted, to kill or wound, it is unnecessary after charging that defendants were "armed with dangerous weapons, to wit: pistols," to allege that the pistols were then and there loaded with gunpowder and bullets, as the language of an indictment need not correspond with the form suggested or with the words of a statute, unless the expression used in the form is necessary to the validity of the accusation, and the descriptive phrase in the indictment, "to wit: pistols," was properly rejected as surplusage, and an averment that the money taken from the prosecuting witness was taken against his will is also unnecessary.

ROBBERY—EVIDENCE—"PRESUMPTION" AND BURDEN OF PROOF.

2. Under Section 784, B. & C. Comp., defining a presumption as a deduction from particular facts, it will be presumed that, when an assault with intent to commit robbery is made by placing the muzzle of a pistol at or near the body of a person from whom money or property is expected to be taken by force, the weapon so employed is loaded with powder and ball, and is a dangerous weapon, and imposes upon the person accused, if he admit the use of the pistol, the burden of proving it was not so charged.

ROBBERY—ADMISSIBILITY OF EVIDENCE.

3. In a prosecution for robbery, where no theory of the cause is advanced by defendant that would render material a plan or diagram of the

interior of the jail in which defendants were incarcerated, a refusal to admit such a diagram is not error.

ROBBERY—TRIAL—INSTRUCTIONS.

4. In a prosecution for robbery and assault with intent to kill if resisted, an instruction that if the jury find from the evidence beyond reasonable doubt that defendants, or either of them, are guilty of stealing from the person of the prosecuting witness the sum described in the indictment or some part thereof, but do not find that they or either of them assaulted said witness with intent, if resisted, to kill or wound said witness, then they should find the defendants or either of them guilty of the crime of larceny from the person, is not erroneous, as robbery is larceny aggravated by the circumstance that the property taken is taken from the person of another by violence or by putting him in fear, and the greater crime necessarily embraces the lesser offense of the same class.

CRIMINAL LAW—GROUNDS FOR NEW TRIAL.

5. After conviction of defendants on the charge of robbery and assault with intent to kill, if resisted, one of the defendants filed an affidavit in support of a motion for a new trial that since the trial affiant has learned that F. took from the prosecuting witness the money specified in the indictment, and that affiant had been informed that, if a new trial was granted, F. would make a full confession completely exonerating affiant from any participation in the crime. A third person was charged in the indictment as "John Doe" with having participated in the crime, and there was nothing to show that F. was not "John Doe." An affidavit by the other defendant was filed stating that he saw F. take the money from the prosecuting witness, but that he did not tell any person thereof until after the trial. There was also evidence that on the day of the robbery, F. had money in his possession similar to that taken from the prosecuting witness. *Held*, that the showing was not sufficient to warrant a new trial.

From Umatilla: HENRY J. BEAN, Judge.

The defendants, Joseph Parr and Samuel Gaston, were indicted, tried and convicted of assault and robbery, being armed with dangerous weapons, and from the judgment and sentence which followed, they appeal. **AFFIRMED.**

For appellant there was a brief over the names of *Mr. Will M. Peterson* and *Messrs. Carter & Smythe*, with an oral argument by *Mr. Peterson*.

For respondent there was a brief and an oral argument by *Mr. Gilbert W. Phelps*, District Attorney.

Opinion by MR. CHIEF JUSTICE MOORE.

1. The defendants, Joseph Parr and Samuel Gaston, were, with another party, jointly charged with the crime of assault and robbery while being armed with dangerous weapons, "to wit: pistols." The crime was alleged to

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Opinion by MR. CHIEF JUSTICE MOORE.

1. The defendants, Joseph Parr and Samuel Gaston, were, with another party, jointly charged with the crime of assault and robbery while being armed with dangerous weapons, "to wit: pistols." The crime was alleged to

have been committed as follows: "The said Joseph Parr, Samuel Gaston, and John Doe, acting together on the 3d day of November, A. D. 1908, in the county of Umatilla and state of Oregon, then and there being and acting together, did then and there with intent, if resisted, to kill or wound one Peter Willox, assault him, the said Peter Willox, they the said Joseph Parr, Samuel Gaston and John Doe so acting together being then and there armed with dangerous weapons, to wit: pistols, and they, the said Joseph Parr, Samuel Gaston, and John Doe so acting together, did then and there unlawfully and feloniously rob, steal and take from the person of him, the said Peter Willox, sixty dollars, gold coin, being three twenty dollar gold pieces, each of the value of twenty dollars, lawful money of the United States, the personal property of him, the said Peter Willox, said money being so stolen and taken at the time of said assault and while Joseph Parr, Samuel Gaston, and John Doe were so armed with such dangerous weapons as aforesaid, contrary to the statute in such cases made and provided and against the peace and dignity of the State of Oregon." Parr and Gaston were jointly tried; and, having been found guilty as charged, they appeal from the judgment which followed. Their counsel contend that because the indictment did not allege that the pistols were then and there "loaded with gunpowder and lead bullets," or aver that the money was taken from the prosecuting witness, "and against his will," the written accusation was insufficient, and that the demurrer which called attention to these defects was erroneously overruled. The statute asserted thus to have been violated is as follows:

"If any person being armed with a dangerous weapon shall assault another with intent, if resisted, to kill or wound the person assaulted, and shall rob, steal, or take from the person assaulted any money or other property which may be the subject of larceny, such person, upon conviction thereof, shall be punished," etc.: Section 1768, B. & C. Comp.

The indictment herein follows the express wording of the enactment on which it is based, but enlarges upon the language quoted by averring in the phrase, "to wit: pistols," the kind of dangerous weapons with which the defendants were armed when the assault and robbery were committed. The model prescribed for that part of an indictment which charges a transgression of the statute hereinbefore set forth is as follows: "Being armed with a dangerous weapon, did commit an assault upon one C. D., with intent, if resisted, to kill or wound the said C. D., and then and there feloniously took a gold watch (or as the case may be) from the person of the said C. D., and against his will": Forms of indictment No. 10, 1 B. & C. Comp. p. 750. In the model thus recommended it will be observed that the phrase "and against his will" is employed. In preparing the written accusation in the case at bar the district attorney did not attempt to follow the form appointed, but patterned the formal charge after the statute: Section 1768, B. & C. Comp. That enactment contains a statement of all the essential elements of robbery required by the rules of the common law, except a provision that the personal property taken was that of the person who was assaulted; and this averment, though not required when the form prescribed is used (*State v. Dilley*, 15 Or. 70: 13 Pac. 648; *State v. Eddy*, 46 Or. 625: 81 Pac. 941: 82 Pac. 707), appears in the indictment herein. The language employed in an indictment need not correspond with the pattern suggested, or with the words of a statute, unless the expression used in the formal charge is necessary to the validity of the accusation: 22 Cyc. 340. Thus a text-writer, discussing the subject of robbery, observes: "It is not essential to charge the taking as 'against the will' if the larceny is otherwise sufficiently charged": 1 McClain, Criminal Law, § 480. To the same effect, see, also, 2 Bishop, New Criminal Procedure, § 1006, sub. 2; Clark & Marshall, Law of Crimes (2 ed.), § 377.

In the case at bar the larceny from the person of Peter Willox is sufficiently charged; and, this being so, the failure to aver in the indictment "and against his will" did not render the written accusation ineffectual: *People v. Riley*, 75 Cal. 98 (16 Pac. 544); *State v. La Chall*, 28 Utah, 80 (77 Pac. 3). From an inspection of the form of an indictment as hereinbefore set forth, it is manifest that the character of the dangerous weapon with which the party charged was armed is not specified. The allegation that a person accused of an assault and robbery was armed with a dangerous weapon, without designating its kind, does not violate a provision of our statute which declares that the indictment must be direct and certain, as it regards the particular circumstances of the crime charged when they are necessary to constitute a complete crime: Section 1306, B. & C. Comp. The statute contains the further provision, to wit: "The manner of stating the act constituting the crime, as set forth in the appendix to this code, is sufficient in all cases where the forms there given are applicable": Section 1305, B. & C. Comp. As form No. 10 hereinbefore quoted, does not specify the kind of weapon used, it is therefore unnecessary to aver its character in an indictment: *Burton v. State*, 3 Tex. App. 408 (30 Am. Rep. 146). To prove whether or not the weapon was dangerous evidence of its kind and character is rendered admissible by the mere statement in the written accusation that the assault was committed by a person who was then and there armed with a dangerous weapon. Although the designating in the indictment before us of the dangerous weapon as, "to wit: pistols," may individualize them, such specification was not necessarily descriptive of the offense; and the qualifying clause was properly rejected as surplusage: *State v. Horne*, 20 Or. 485 (26 Pac. 665); *State v. Lee*, 33 Or. 506 (56 Pac. 415); *State v. Humphreys*, 43 Or. 44 (70 Pac. 824). The indictment being sufficient, no error was committed in overruling the demurrer.

2. It is insisted by defendants' counsel that an error was committed in charging the jury as follows: "I instruct you that a revolver or a pistol loaded with powder and ball is a dangerous weapon." The testimony given by the witnesses who appeared for the state tended to show that on November 3, 1908, Willox was in a saloon at Pendleton with others drinking "near" beer; that, after several bottles of such refreshment had been consumed and paid for by others, some more of the malt liquor was brought to the tables at which people were sitting and Willox was requested to pay therefor, but he refused because he had not ordered the beverage; that in consequence of such refusal a dispute arose, and to settle the difficulty amicably one of the men present offered to loan Willox a dollar with which to pay for the drinks, but he declined the offer, saying that he had with him sufficient money for his needs, at the same time taking from his pocket and exhibiting a few gold and some silver coins. Willox testified that immediately after the controversy mentioned he went to a toilet at the rear of the saloon, when, upon turning around, the defendants pointed revolvers in his face and ordered him to throw up his hands, which command he obeyed, whereupon the money was taken from his pocket by the third man whom he did not know, and he was told to "go on." These incriminating statements were severally denied by the defendants, who, as witnesses in their own behalf, testified that after the difficulty which arose over the refusal of Willox to pay for the beer he did not go to the rear of the saloon, but went immediately out at the front thereof. The guns described by Willox, and with which he asserts the assault was made upon him, not having been used as bludgeons, cannot be designated as dangerous weapons unless they were loaded with powder and balls, as specified in that part of the charge to which reference has been made. No direct evidence was offered at the trial

reasonable doubt that the defendants or either of them are guilty of stealing from the person of Peter Willox the sum of money described in the indictment, or some part thereof, but do not so find that the defendants, or either of them, assaulted said Willox with intent, if resisted, to kill or wound said Willox, then you should find the defendants, or either of them that you find so guilty, of the crime of larceny from the person." Robbery is larceny aggravated by the circumstance that the property asportated was taken from the person of another by violence or by putting him in fear: Clark & Marshall, Law of Crimes, § 370. As the greater crime necessarily embraces the lesser offense of the same class, no error was committed in charging the jury as last herein specified: 2 Cur. Law, 1524; 18 Enc. Pl. & Pr. 1233.

5. It is contended by defendants' counsel that an error was also committed in refusing to set aside the verdict and to grant a new trial. In support of the motion so overruled, Parr filed his affidavit to the effect that since the trial he had learned that Charles Flush took from Willox the money specified in the indictment, \$20 of which was given to Gaston, and that the affiant had been informed that, if a new trial were granted, Flush would make a full confession completely exonerating him from any participation in the commission of the crime charged. So far as disclosed by the affidavits, the third person named in the indictment as "John Doe" may have been the Charles Flush referred to and a party to the commission of the crime. Gaston's affidavit states that he saw Flush stealthily take the money from Willox, but that he did not tell any person thereof until after the trial herein. Also Frances Smith's sworn declaration shows that on the day of the alleged robbery Flush exhibited to her two twenty-dollar gold pieces.

We do not think the showing thus made was sufficient to have authorized the court to set aside the verdict and to grant a new trial. The jury evidently believed from

the testimony offered that the defendants were parties who participated in the taking of the money in the manner alleged. The verdict indicates such conclusions, and, as a fair trial was had, the judgment is affirmed.

AFFIRMED.

Decided April 11, rehearing denied July 27, 1909.

GIANT POWDER CO. v. OREGON WESTERN RY. CO.

[101 Pac. 209; 108 Pac. 501.]

APPEAL AND ERROR—APPEALABLE ORDERS—SUSTAINING DEMURRER.

1. An appeal does not lie from an order sustaining a demurrer to a complaint; such order not being a determination of the action.

APPEAL AND ERROR—APPEALABLE ORDERS—"ACTION"—"SUIT"—"COMPLAINT."

2. A "suit" or "action" being "the lawful demand of one's right in a court of justice" while a "complaint" is, under Section 87, B. & O. Comp., a plain and concise statement of the facts constituting the cause of action or suit, the dismissal of the complaint on the sustaining of a demurrer thereto does not necessarily discharge the lawful demand so as to terminate the action and permit an appeal from the order of dismissal.

From Douglas: **JAMES W. HAMILTON**, Judge.

ON MOTION TO DISMISS.

Mr. William D. Fenton and *Mr. Rufus A. Leiter*, for the motion.

Mr. John F. Logan and *Mr. John C. Shillock*, *contra*.

1. **PER CURIAM**: This suit was brought to foreclose a lien on the right of way and roadbed of defendant railway company for materials furnished a grading contractor. The defendant demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of suit. The demurrer was sustained. The entry of the record is as follows: "After consideration of the briefs filed in said cause, it is ordered and adjudged that said demurrer be and is hereby sustained." The plaintiff appealed to this court from such order, and the transcript was filed in due time. Thereafter the abstract and briefs were filed, and the cause came on for hearing in the regular order, whereupon defendant moved to dismiss the appeal, because it was prematurely taken.

We have no alternative but to sustain the motion. The order for which an appeal will lie is one which not only affects a substantial right of the party appealing, but which, in effect, determines the action or suit. It must conclude the parties as regards the subject-matter in the proceeding then pending: *Henderson v. Morris*, 5 Or. 24; *State v. Security Savings Co.* 28 Or. 410 (43 Pac. 162); *Marquam v. Ross*, 47 Or. 374 (78 Pac. 698; 83 Pac. 852; 86 Pac. 1); *Sears v. Dunbar*, 50 Or. 36 (91 Pac. 145). The order from which the appeal is taken in this case does not have that effect. It merely sustains the demurrer, without finally determining the suit in any way. The court still had jurisdiction of the case, with authority at its discretion to allow the complaint to be amended or a new pleading to be filed: Section 101, B. & C. Comp. Some further action of the court was necessary and required before the determination, as to the sufficiency of the complaint, could become final in the sense of the statute governing appeals. As said by Mr. Justice MCARTHUR, in a similar case: "There must be a judgment in the technical sense of the word on the demurrer": *State v. Brown*, 5 Or. 119. And no such judgment or decree was rendered or made prior to the appeal.

The motion is allowed, and the appeal dismissed.

DISMISSED.

Decided July 27, 1909.

ON PETITION FOR REHEARING.

[108 Pac. 501]

2. **PER CURIAM:** This is a petition for a rehearing, in which plaintiff's counsel insist that in dismissing the appeal in this cause an error was committed. The trial court sustained a demurrer to the complaint, from which order the plaintiff, without procuring a decree dismissing the suit, attempted to appeal. Its abstract and the briefs of the respective parties were

filed, and the cause came on for hearing March 11, 1909, at which time a motion was interposed to dismiss the appeal on the ground that the order was not final. Supplemental to the motion there was filed with the clerk of this court a duly authenticated copy of an order made in this cause May 22, 1908, by the lower court dismissing the complaint. Considering the motion, the appeal was dismissed (*Giant Powder Co. v. Oregon Western Ry. Co.* 101 Pac. 209), and upon a re-examination of the question we are convinced that the conclusion reached is warranted by the condition of the record.

A suit is pending in the trial court until it is regularly determined by a final decree. An order sustaining a demurrer to a complaint may be a preliminary action which ultimately induces or necessitates a conclusion of a cause; but, until dismissed by a judgment or a decree, the action or suit is still pending in that court. The order of May 22, 1908, does not purport to dismiss the suit, but only the complaint. The statute makes a distinction between "actions" and "suits." An "action" is a proceeding at law to enforce a private right or to redress a private wrong (Section 1, B. & C. Comp.); but in equity the compulsion for that purpose is known as a "suit": Section 390, B. & C. Comp. "A suit or action, according to its legal definition, is the lawful demand of one's right in a court of justice": 1 Words & Phrases, 129. In pleading a "complaint" is a plain and concise statement of the facts constituting the cause of action or suit: Section 67, B. & C. Comp. A distinction is thus made between a "complaint" and a "suit" or an "action," and, when a demurrer to a complaint is sustained, the "lawful demand" referred to is not necessarily discharged, for an amendment of the pleading may be allowed: Section 200, B. & C. Comp. Dismissing a complaint therefore does not inevitably terminate the suit or action.

It must be conceded that the construction thus given is quite restricted; but as the order of May 22, 1908, was procured without notice to the plaintiff, and as its counsel had no knowledge thereof until more than six months had elapsed after its entry, so that an appeal therefrom is barred if the cause was thus finally terminated, the defendant's counsel should be governed by the technical rule which they have invoked. Nor can a *nunc pro tunc* order be now made so as to effect a dismissal of the suit as of the date of the order dismissing the complaint, thereby preventing an appeal, for the latter order expressly states that it was made upon motion to dismiss the complaint, and hence no error was made in entering the order.

Since this suit is still undetermined in the lower court, notwithstanding the complaint was dismissed, we are compelled to adhere to our former ruling.

DISMISSED: REHEARING DENIED.

Argued March 29, decided June 8, rehearing denied July 27, 1909.

MAHON v. RANKIN.

[102 Pac. 608; 108 Pac. 58.]

EVIDENCE—ADMISSIONS—CONCLUSIVENESS.

1. In an action for commissions earned by the purchase of land for defendants, where plaintiff claimed that the agreement was that he should receive \$1 an acre when he secured options on the land and deposited the deeds in escrow, but defendant claimed that he was not to receive any commissions unless defendant exercised his option and resold the land, and defendant introduced letters from plaintiff, written after plaintiff had stated in another letter to defendant that he had purchased the land, and considered his part of the contract fulfilled, which letters related to securing control of certain land, the options on which had expired after plaintiff had obtained them, and were introduced as being admissions against plaintiff's interest and tending to show that he had an interest in the disposal of the option lands, plaintiff could explain the letters and show that they related to another contract made with defendant; written admissions not being conclusive, but being subject to rebuttal or explanation.

EVIDENCE—COMPETENCY—INTENT.

2. The intent of a person in doing an act, or in uttering a declaration, when material, may be testified to by the actor, whether he is a party or not, and however inconclusive or inconsistent his testimony may be; that going only to its weight.

BROKERS—ACTIONS FOR COMPENSATION—ADMISSIBILITY OF EVIDENCE.

3. In an action for commissions, claimed to have been earned by purchasing land for defendant, where defendant claimed that plaintiff received a commission from the seller of a tract in violation of his relations as agent, which commission plaintiff claimed was received for defendant's benefit and by his authority, evidence was admissible of the employment and the extent of the authority of another, employed by defendant to assist plaintiff in securing the options, who, by plaintiff's direction, communicated to defendant the proposed terms for the purchase of the tract in question, but the compensation he was to receive from defendant was immaterial.

EVIDENCE—RELEVANCY—FACTS FORMING PART OF TRANSACTION.

4. Where, in an action for commissions for buying land for defendant, plaintiff offered testimony as to an arrangement by defendant with another to assist plaintiff in buying the land, in order to show that defendant authorized the purchase of a tract upon certain terms, which were communicated to defendant by such other testimony in connection with such evidence as to the compensation defendant was to pay the other, was not admissible under Section 702, B. & C. Comp., permitting the whole of an act or declaration to be inquired into by the other party, where a part thereof is given in evidence by one party; defendant not having offered any part of the transaction with such other in evidence or testified as to the terms of his employment.

EVIDENCE—RELEVANCY—FACTS FORMING PART OF TRANSACTION.

5. In order to be admissible under Section 702, B. & C. Comp., permitting the whole of any declaration or conversation on the same subject to be inquired into by the other party, where a part thereof is given in evidence by one party, the rest of the conversation must be material, and affect in some way the part already given in evidence.

APPEAL AND ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE—PREJUDICIAL EFFECT.

6. In an action for commissions earned by the purchase of land for defendant, where plaintiff claimed that the agreement was to pay \$1 an acre when he secured options on the land and deposited the deeds for defendant, but defendant claimed that plaintiff was not to receive any commission unless he exercised the options and resold the land, error in admitting irrelevant testimony that defendant hired another to assist plaintiff, and promised to pay him a certain sum, was not prejudicial, where defendant testified that such compensation was also contingent upon his acceptance of the options and resale of the land, in view of defendant's contention as to the contract with plaintiff.

PRINCIPAL AND AGENT—ACTIONS—JURY QUESTION—AUTHORITY.

7. Where the authority of an agent is disputed, the question is for the jury.

BROKERS—AUTHORITY—QUESTION FOR JURY.

8. While the question of the authority of an agent is for the jury, where it is disputed, the court should declare whether a given act is in excess of the agent's authority, so that, in an action for commissions for purchasing land for defendant, the court properly instructed that any payments made by plaintiff to sellers in excess of the amount limited by defendant was without authority.

APPEAL AND ERROR—HARMLESS ERROR—FAVORABLE TO COMPLAINING PARTY.

9. Error, in an instruction in assuming as a fact that the contract of agency was as contended by defendant, was favorable to him, and he cannot complain thereof.

TRIAL—INSTRUCTIONS—REQUESTS—NECESSITY—ADDITIONAL INSTRUCTIONS.

10. In an action for commissions claimed to have been earned by purchasing land for defendant, an instruction that, if plaintiff exceeded his authority by making a larger first payment, or paying more per acre, than authorized, and defendant knew all the material facts in connection with plaintiff's acts, and accepted the benefits resulting therefrom, defendant by his conduct ratified plaintiff's unauthorized act, being the correct rule, if defendant desired an instruction as to what constituted the material facts as to plaintiff's acts in excess of his authority, he should have expressly called the court's attention to the omission.

BROKERS—ACTIONS—PLEADING—RATIFICATION.

11. In an action for commissions, claimed to have been earned by the purchase of land for defendant, where the latter claimed that plaintiff acted in violation of his agency by paying a higher price per acre than he was authorized, etc., allegations of the complaint that plaintiff notified defendant from time to time of the purchases, the purchase price, amounts of payments, etc., and defendant, knowing of the purchases and terms thereof, ratified them, as well as the allegations of the reply that the payments of the land in excess of the price thereof were made with defendant's knowledge, and ratified by him, sufficiently alleged ratification.

PRINCIPAL AND AGENT—ACTIONS—PLEADING—RATIFICATION.

12. An allegation that the principal, with full knowledge of the facts, ratified the agent's unauthorized act is sufficient, without setting out how it was ratified.

EVIDENCE—PAROL EVIDENCE.

13. In an action on a parol contract, letters and telegrams passing between the parties some 3½ months after the making of the contract are not primary evidence of the terms thereof though they contain references as to what the parties understood as a part of the contract, but are admissible as admissions of what had been previously concluded between them, subject to explanation by them.

From Lane: LAWRENCE T. HARRIS, Judge.

Statement by MR. JUSTICE SLATER.

This is an action by H. C. Mahon against M. B. Rankin to recover \$39,692.15, and interest thereon from January 15, 1907, at the rate of 6 per cent per annum, claimed to have been earned as a commission for the purchase of 40,898.65 acres of timber land in Lane, Benton, and Douglas counties, under a special oral agreement made with defendant about November 1, 1906. The substance of the material averments of the amended complaint are: That the plaintiff was to procure from the several owners of such lands contracts for the sale thereof to defendant, at such prices as plaintiff should agree to pay therefor to the owners, paying part and

procuring a valid agreement to convey to the defendant upon the payment by him of the balance of the purchase price, at a time to be fixed by plaintiff and the owner in such contract; that defendant was to furnish money to make the first payments, and plaintiff was to cause deeds to be executed by the owners sufficient in form to convey the legal title to defendant, and have them deposited in escrow with the First National Bank of Eugene, Oregon, with directions to deliver the same to defendant on payment of the balance of the purchase price; that defendant was to make such final payments at their maturity, and pay plaintiff \$1 for each and every acre so purchased by plaintiff; that pursuant to the terms of the contract, defendant furnished and advanced to plaintiff \$46,200 to enable him to make advance payments, and with which, prior to January 15, 1907, he made contracts to purchase 40,898.65 acres of timber land, and caused deeds thereto to be executed in defendant's favor, and to be deposited in said bank, so that there became and was due plaintiff \$40,898.65, of which defendant had paid plaintiff \$1,206.50, and had refused to pay the balance; that from time to time during the performance of the contract by plaintiff, and as the contracts to purchase were procured from owners, plaintiff notified defendant of the purchases, the price to be paid, the dates of payment and delivery of the deeds, all in ample time before the expiration of the time for payment; and that from time to time the defendant, being informed, and well knowing, of the said purchases and of the terms thereof, ratified and approved the same, but that defendant made final payments and accepted and received deeds for only 1,330 acres of the land and owns the same, and that he did not, and has not, completed the payments on the balance thereof.

The answer admits the making of a contract with plaintiff respecting the purchase of that amount of timber land, but denies the terms thereof to be as alleged in the complaint. In substance, defendant avers that the

lands were not to be purchased by him except at his option; that by the terms of their agreement plaintiff was limited to contract with the owners to pay them no more than \$14 per acre, and no more than \$50 as a deposit for each quarter section, and for his services plaintiff was to have a fee of \$1 an acre, payable only upon the contingency that defendant should complete the purchase of all of the land and sell it to certain prospective purchasers, whom defendant then had in contemplation, and, in case he failed or refused to complete the purchase, and failed to dispose of the land, then plaintiff was to receive nothing for his services, but it was admitted that defendant was to advance necessary funds for the purpose of securing options in the manner alleged by him, and that for such purpose he had advanced to plaintiff a total of \$46,200; that he had paid plaintiff \$1,000, but denied that it was upon the contract alleged; that plaintiff had received and retained out of the moneys advanced to him a balance of \$206.50, and, by failure to deny, it was admitted that defendant had made final payments, and had received and accepted deeds for 1,330 acres of land, but had failed to make payments on the balance of the total amount of 40,898.65 acres. As a separate defense, and as a counterclaim, defendant has alleged the terms of the agreement as previously stated by him, and that in pursuance thereof he advanced the sum of \$46,200, but that plaintiff, in violation of his power of agency, and without the authority or knowledge of the defendant, paid, out of the money advanced to him, to sixty-one different owners, whose names are set forth in the answer, together with the several amounts paid, aggregating \$7,070, as a deposit upon an option to purchase at a rate exceeding \$14 per acre, and that he likewise paid to eight other persons the several amounts stated, aggregating \$975, as a deposit upon said option, wherein he exceeded the authorized deposit of \$50 per quarter section, but did not exceed \$14 per acre, the total

purchase price; that plaintiff had on hand, and unexpended, the sum of \$206.50, mentioned in the complaint, and the further sum of \$1,000 advanced to him, which was to be used, but was not used, by him in procuring options, making a total counterclaim of \$9,251.50; that defendant failed to sell the land, and failed to complete the purchase of the same, and that the options and money advanced thereon were forfeited to the owners; that plaintiff had not repaid defendant any part of the amount for which a counterclaim is made. A second counterclaim was also made by defendant, but, as it was admitted by his counsel during the trial that he was not entitled to recover thereon, it need not be stated. As a bar to a recovery a third defense was made, to the effect that plaintiff, while acting as defendant's agent in securing options to purchase, had made an agreement severally with Snodgrass and other owners of lands, whereby plaintiff was employed to act as the agent of such owners severally in the sale of their lands to defendant, and was to be paid and receive from such owners severally a commission of 5 per cent on the purchase price in case the options were exercised by, and sales consummated with, defendant.

The reply denies the alleged limitations upon plaintiff's authority, and that he made the payments set forth in the answer without the authority or knowledge of the defendant, or in violation of his agreement or power of agency; but he alleges that they were made with the authority and knowledge of the defendant, who, well knowing that such payments had been made, duly ratified them. As to the plea in bar, set up in the third defense, the plaintiff denies the same, and further pleads that the contracts for a commission, mentioned in the answer, were made with T. G. Hendricks, who, for himself and others, had control of twenty-two quarter sections of land, which were agreed to be purchased for defendant at \$20 per acre, with 5 per cent off as commision, making

the price thereof to defendant \$19 per acre, and that plaintiff did not receive any profit therefrom to himself, but that defendant was to receive, and did receive, the contracts therefor at \$19 per acre. A trial being had before a jury, a verdict was returned in plaintiff's favor for the amount demanded, and from the judgment entered thereon defendant has appealed. **AFFIRMED.**

For appellant there was a brief over the names of *Messrs. Coovert & Stapleton, Mr. William D. Fenton* and *Mr. James E. Fenton*, with an oral argument by *Mr. William D. Fenton*.

For respondent there was a brief over the names of *Mr. Martin L. Pipes, Mr. George F. Skipworth* and *Mr. George A. Pipes*, with oral arguments by *Mr. Martin L. Pipes* and *Mr. Skipworth*.

MR. JUSTICE SLATER delivered the opinion of the court.

1. The first error assigned for a reversal of the judgment is based upon an exception to the admission of the testimony of plaintiff given in rebuttal, and in explanation of his written declarations against his interest in a series of letters and telegrams addressed to the defendant. They were dated after January 15, 1907, on which date plaintiff had addressed a letter to the defendant, in which he had stated, in substance, that he considered his part of the original contract fulfilled, inasmuch as the land had been purchased, the deeds secured, and placed in the bank according to agreement, and that he considered his commission of \$1 per acre earned, and that he would treat any work done after January 14th as under a new agreement. He therein offered to continue his services with defendant, and states terms. But, on the 18th, defendant replied, declining the offer, and denying, in effect, plaintiff's claim of a completed contract. In the meantime, on the 16th, plaintiff telegraphed defendant in relation to "fifteen thousand acres in larger tracts with

very favorable prospects of control on reasonable terms," and on the 17th addressed him a lengthy letter about the future control of 1,807 acres owned by one party, which had been under contract at \$15 per acre, but the time had expired; and about other land owned by other parties. Now, after plaintiff's attention had been particularly directed to the letter of the 17th, he was requested by his counsel to explain whether he had any conversation or negotiations with Rankin concerning his employment under another contract, different from the one on which the action was brought, and whether, in contemplation of these negotiations being consummated, he undertook to do anything under them. The answer to each inquiry was, "I did." The witness was then conducted through all of his subsequent written communications and telegrams relating to further contracting for, or controlling, timber lands, or the sale thereof to other parties, and in each instance referred his acts and declarations to a supposed or contemplated new contract with defendant, made after April 15th, his answers in some instances being opposed to, or contradicting, the natural inference to be drawn from his written declarations. The objection interposed was that such testimony was incompetent and immaterial, and that, so far as it was material, it tended to dispute the writings referred to and introduced in evidence. It is argued that such writings cannot be explained, varied, or modified by oral testimony, and therefore it is incompetent. The letters and telegrams referred to were introduced in evidence by defendant, not to prove the terms of the contract alleged by him in his answer, but as containing declarations made by the plaintiff against his interest, while in the performance of the contract sued upon, and tending to show that the original contract upon which the action is based had not then been fully performed by plaintiff, and also that plaintiff had some further interest in the ultimate disposal of the optioned lands. Therefore such declarations

stand upon the basis of admissions in writing, but, as a general rule, such admissions, although in writing, are not conclusive any more than if orally made, and therefore the party making them may prove the contrary, or show that they were made by mistake: 1 Enc. Ev. 396; *State v. Blodgett*, 50 Or. 329 (92 Pac. 820); *Gradwohl v. Harris*, 29 Cal. 150. The defendant, in support of his contention, having produced testimony relating to transactions subsequent to the time of the completion of the contract as alleged in the complaint, the plaintiff is not for that reason precluded from explaining such transactions, if he can, and referring the doing of such acts and the statements made by him to another or different contract.

2. The second error relied upon is of the same nature, but more definite and specific. Plaintiff was asked: "You may state whether or not in using the word 'we' in relation to your services in this matter of Mr. Rankin's you indicated, or meant to indicate, to him that you had any other interest than your dollar an acre." Objection was made that the testimony sought was incompetent, and that the letter containing the declaration speaks for itself. The objection being overruled, plaintiff answered that he had not thought of indicating to Mr. Rankin that he had any interest in the transaction beyond the carrying out of his contract for a commission of \$1 an acre. In addition to the point just passed upon, the objection also involves the propriety and mode of the proof of an intent. It seems to be the general rule in this country that whenever, in either civil or criminal cases, the intent of a person in the doing of an act, or in the uttering of a declaration, becomes material, such person, whether a party to the cause or not, may testify directly as to what his intention was in the given instance: 7 Enc. Ev. 596. Such testimony is admissible, no matter how inconclusive, unsatisfactory or inconsistent it may

be, as such characteristics affect only its weight: *Pope v. Hart*, 35 Barb. (N. Y.) 630.

3. C. E. Ireland was permitted to testify, over defendant's objection, concerning the terms of a contract made between him and Rankin about November 16, 1906, whereby the former was to help plaintiff in the performance of the contract involved in this action. Being asked to state what the arrangement was, he answered: "Mr. Rankin told me if I would go up and help Mr. Mahon out he would give me ten thousand dollars." On defendant's motion, and with plaintiff's consent, the latter part of the answer referring to the compensation was stricken out, and the jury instructed to disregard it. Ireland had also testified that Rankin told him in the same conversation, in a general way, that he (Rankin) was to pay Mahon \$1 per acre for his work, but that he did not go into details. Rankin's attention, when testifying in chief in his own behalf, was called to Ireland's statement as to what was said about Mahon's compensation, and was asked by his counsel to state the facts in relation thereto. He answered: "Well, that was the general conversation; that when the land was turned, Mr. Mahon was to have a dollar an acre. We never went into the details as to the contract between me and Mahon." He was asked on cross-examination to state how much he was to pay Ireland for his work. This was objected to as immaterial, and, being overruled, defendant stated that he was to pay Ireland \$10,000, and prejudicial error is assigned thereon. Plaintiff testified that Rankin, in response to his request for men to pass on this land, sent Ireland; and there was offered and received in evidence, over defendant's objection, a letter, dated November 16, 1906, written by defendant, and addressed to plaintiff, introducing C. E. Ireland, who delivered the same to plaintiff on the following day. So far as material, it contains this statement: "Now, he will take up any line to assist you in any way that he can, either go and negotiate with

parties, go and see them, or go in and take a bird's eye view of some of the timber. He is perfectly reliable and trustworthy, and does not talk in the least. * * You can consult with Mr. Ireland, and he can act, wherever you direct, in such a way that it will not conflict. In cases where it will be necessary for you to be in two places at once, he can fill one for you." These several objections will be considered together.

The main issue between the parties to this action involves the nature and terms of an oral contract made by them, and on which plaintiff seeks to recover. Plaintiff and defendant were the only persons present when this contract was made. If the promise was that plaintiff should have \$1 an acre when the options were secured and deeds deposited in the bank, then plaintiff was entitled to recover, provided he performed and kept the other terms of the contract. But if the agreement was that plaintiff was not to be paid \$1 on account of the options secured and deeds thus deposited, unless the options were taken by the defendant, then plaintiff was not entitled to recover, except to the extent sales were consummated by delivery of the deeds to defendant. Defendant's counsel urged that, as the testimony of plaintiff and defendant, respectively, was directly in conflict upon this main question, a slight apparent corroboration of plaintiff was sufficient to turn the scale against the defendant; that the only corroboration was the testimony of Ireland as to the arrangement made with him by defendant in connection with the same transaction, by which it is claimed defendant agreed to pay Ireland, unconditionally, the sum of \$10,000, for his services; that while the court, upon objection of counsel, struck out so much of the answer of the witness, Ireland, as disclosed the amount of his compensation, there was left before the jury so much of Ireland's testimony on that subject as detailed the fact that he was employed by the defendant to secure these options, and that he was paid, or to

be paid, therefor. It is claimed that it was error to allow any portion of such testimony to be considered by the jury, and that such error was emphasized when the court required defendant, upon his cross-examination, to testify, not only that he had made such an arrangement with Ireland, but that he had agreed to pay him \$10,000 for his services. On the other hand, it is claimed by the plaintiff that the fact and extent of Ireland's agency for defendant in securing these options were material to the issue, because he was to, and did, perform work for defendant under the direction of the plaintiff. We are of the opinion that this latter contention is correct. The evidence shows that, by plaintiff's direction, Ireland personally carried to defendant the offer, and proposed terms of the pending negotiations with T. G. Hendricks respecting the purchase of twenty-two quarter sections, at \$20 per acre, with 5 per cent off as commission, and returned with a check drawn by the defendant, for the sum of \$8,000, payable to himself, to consummate that deal.

4. It will be remembered that the issue raised by the third separate defense, and the reply thereto, was whether plaintiff was to receive this commission in violation of his fiduciary relation to the defendant, as the answer alleged, or whether the latter was to, and did, receive the benefit of such reduction, and that he had knowledge thereof, and authorized the purchase to be made upon the terms stated, as alleged in the reply. The solution of this issue depended entirely upon the testimony of Ireland as to what knowledge of that matter he possessed, and what he imparted to his principal, and for that reason evidence of his employment and the extent of his authority was admissible. But as to what compensation Ireland was to receive, that was wholly immaterial and irrelevant to any issue in this case, and this is practically conceded by plaintiff's counsel. Nor would plaintiff be entitled to such evidence because it formed a part

of a general conversation, as contended for by him. The statute provides that

"When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole, on the same subject, may be inquired into by the other": Section 702, B. & C Comp.

The plaintiff is the party who offered the statement made by defendant to Ireland as to what the former was to pay plaintiff, and such offer conferred upon defendant the right to state all that was said at the time on the same subject that would, in any way, qualify or explain the admissions. In doing so he did not testify as to the terms of Ireland's employment, but qualified the purported admission by admitting that he said "that, when the land was turned, Mr. Mahon was to have a dollar an acre." Defendant was not in the position of an actor offering a part of a conversation against the interest of plaintiff, but of explaining what had been introduced against himself by plaintiff, and the latter's rights are confined to the ordinary rules governing cross-examination of a witness.

5. Moreover, it was held in *Rollins v. Duffy*, 18 Ill. App. 398, that proof of the conversation must be confined to matters material to the issue, and tending to explain or qualify what has been said by the other party and proved as admissions, and that when parts of a conversation are material, and other parts are not only immaterial, but have a direct and manifest tendency to prejudice the other party in the minds of the jury, it is the duty of the court to admit only those portions which are material. A different rule has been declared in some cases, in which it is held that everything said in the conversation, whether material to the issue, or tending to explain the admission proved on the other side or not, is admissible. It is believed, however, that the better rule is that the balance of the conversation to be competent must be material, and in some way affect that portion of

the conversation already proved: *Wilhelm v. Cornell*, 3 Grant, Cas. (Pa.) 178. That appears to be the intent of our statute in limiting the right to the balance of the conversation to that which is "on the same subject."

6. It is contended, however, that, as Ireland's agreed compensation was also conditional, no injury could result to the defendant from the admission of such testimony. Defendant's answer to the question addressed to him by plaintiff's counsel was: "I told him if the deal was carried through on the basis it had been arranged, I would give him \$10,000"—and immediately he was asked, "That was contingent also?" to which he replied, "Yes, sir." While we are satisfied that whether defendant agreed to pay Ireland this sum conditionally or unconditionally, it would not be relevant or material to the issue; but, defendant having also stated that his agreement to pay Ireland was conditional upon the deal being carried through on the basis it had been arranged, it is manifest that it could not prejudice defendant, for if any inferences applicable to the issue can be drawn therefrom, it tends more to support defendant's contention than that of plaintiff's, and its tendency could not in any event be to excite prejudice against defendant in the minds of the jury.

7. The court gave this instruction:

"If plaintiff exceeded his authority, both as to the initial payment of \$50 per 160 acres and \$14 per acre purchase price, or if he exceeded his authority in either of such particulars, and if you further find that defendant gained a knowledge of all the material facts in connection with the acts of plaintiff in so exceeding his authority, and the defendant adopted such acts of plaintiff, and accepted the benefits resulting from such acts of plaintiff, then such conduct upon the part of defendant would be ratification of the unauthorized acts of plaintiff, and such ratification would bind defendant to the same extent as though plaintiff acted within the terms of his authority, and in case of such ratification, defendant would not be entitled to any allowance or verdict for such sums as were paid out in excess of authority and afterwards ratified."

8. It is first objected that the court, by this instruction, submitted a question of law to the jury, viz., as to whether plaintiff had exceeded his authority in both, or either, of the particulars mentioned. Where there is a dispute as to the authority of an agent, it is for the jury to find the facts, but it is the duty of the court to declare to the jury whether a given act comes within, or is in excess of, the agent's authority: *Long Creek Bldg. Ass'n v. State Ins. Co.* 29 Or. 569 (46 Pac. 366); *Anderson v. Adams*, 43 Or. 621, 633 (74 Pac. 215).

9. The instruction assumes as a fact that plaintiff's authority was limited to the initial payment of \$50 for each 160 acres, and of \$14 per acre purchase price. This, however, is in conformity with defendant's contention and is therefore in his favor, and not prejudicial to him. It also declares, in effect, that any payments made by plaintiff in excess of either limitation would be without authority, and this was within the province of the court, and it was left to the jury to find the number and extent of payments, if any, in excess thereof, which was a question of fact. In that respect the instruction is not open to criticism.

10. It is also objected that what were "the material facts in connection with the acts of the plaintiff in so exceeding his authority" is a question of law; and, as it is claimed that no definition thereof was given, it was error to submit such question to the jury. We think the instructions, taken as a whole, clearly informed the jury what were "the material facts" in that respect; but, if they do not, the instruction states a sound principle of law, and, if the defendant desired a more particular definition as to what constituted material facts, it was incumbent upon him to call the court's attention to the particular grounds upon which the objection was based, so that the trial court might have an opportunity to make a correction, if necessary, but the exception was general, and not specific: *Kearney v. Snodgrass*, 12 Or.

311 (7 Pac. 309) ; *Aupperle v. Anderson*, 51 Or. 556 (95 Pac. 330). These observations will also apply to the criticism made by the defendant's counsel to the last part of the instruction as to what acts amounted to a ratification.

11. Error is also predicated upon the ground that the court instructed the jury upon the subject of ratification, when it is claimed the same had not been pleaded and was not within the issues, and that the plaintiff must recover upon the case made by his complaint, or not at all, under the rule related in *Neimitz v. Conrad*, 22 Or. 164 (29 Pac. 548). If it is incumbent upon plaintiff to plead ratification in order to avail himself thereof, which seems to be contrary to the prevailing rule (16 Pl. & Pr. 904), we think it is sufficiently alleged, not only in the complaint, but in the reply. In the former it is alleged "that from time to time during the performance of the said contract by the plaintiff, and as the said contracts were procured from the said owners, the plaintiff notified the defendant of the said purchases, of the price to be paid for the said lands, of the times of payment, and of the delivery of the said deeds, all in ample time, before the expiration of the times of payment provided in the said contracts. And that from time to time, the defendant, being informed and well knowing of the said purchases and the terms as aforesaid, ratified and approved the same." And in the reply, referring to the charge of paying more than \$14 per acre, it is alleged "that the said payments so made as described in the answer were made with the authority and knowledge of the defendant, and were duly ratified by the defendant, he, the said defendant, then and there well knowing that the said payments to the persons set forth in said answer had been made in the sums therein respectively stated."

12. A similar averment is also made in reply to the charge of having advanced more than \$50 per each 160 acres contracted for. An express averment that plain-

tiff, with full knowledge of the facts, ratified the act is sufficient, without stating how it was ratified: *Harding v. Parshall*, 56 Ill. 219.

Many other technical objections are made to the instructions, but it is sufficient to say that we have carefully examined each of them, and find no merit therein.

It follows that the judgment is affirmed. **AFFIRMED.**

Decided July 27, 1909.

ON PETITION FOR REHEARING.

[108 Pac. 53.]

MR. JUSTICE SLATER delivered the opinion of the court.

13. In a motion for a rehearing defendant has called our attention to the fact that in passing upon the first assignment of error we erroneously stated that plaintiff's evidence, to which objection was made, was given in rebuttal, whereas it was upon his redirect examination. The series of letters and telegrams referred to in the opinion were offered in evidence by the defendant during plaintiff's cross-examination. The correction as to the facts will not require a different application of the principles of the law of evidence discussed. It is now contended that the defendant, upon plaintiff's cross-examination, offered in evidence the letters and telegrams of the plaintiff for the purpose of showing that the terms of the contract were as alleged by the defendant, whereas we have said they were introduced, "not to prove the terms of the contract alleged by him in his answer, but as containing declarations made by the plaintiff against his interest," etc., and upon the correctness of this, counsel for defendant have taken issue, and if they are correct, a different application of the rules of evidence must follow. In proof of their contention our attention is directed to the statement of defendant's senior counsel, made when he was asked for what purpose he was offering this testimony, to wit, "I am offering all the correspondence for the purpose of showing that Mahon knew that Ran-

kin had to turn the lands, and that he wasn't to get his money until the lands were turned," and, "It is also inconsistent with his present testimony." We think this does not tend to establish the contention made. It is alleged, both in the complaint and in the answer, that the contract upon which the action is based was made about November 1, 1906, and it is admitted by both parties in their briefs that the terms thereof were not reduced to writing, but rested in parol. How, then, could it be said that letters and telegrams passing between the parties some two and one half months thereafter contained the terms of the contract; that is, constituted the respective parts of the contract? There may have been, and probably was, some reference therein as to what the plaintiff understood was a part of the terms of the contract, and they may have tended to show that "Mahon knew that Rankin had to turn the lands, and that he wasn't to get his money until the lands were turned," but that would not constitute the primary evidence of the contract, which rested in parol. In other words, they are not the offer and acceptance of the respective parties, but admissions of what has been previously concluded between them. We have re-examined the question passed upon as to the admissibility of plaintiff's testimony from the standpoint of the authorities cited in the motion, but we can see no reason for departing from what we have already held. The case of *Nutter v. O'Donnell*, 6 Colo. 253, is cited. It is there held that an admission made at one time cannot be rebutted by a declaration at another. *Harding v. Clark*, 15 Ill. 30, is to the effect that self-serving declarations made by a defendant after the service of a writ of attachment will not be received to controvert declarations against interest made before, and *Blight v. Ashley*, Fed. Cas. No. 1,541, is to the same effect. But that is not the character of the testimony offered here. It is substantive in character, tending to show a different arrangement between

the parties to which the letters and telegrams are claimed to have reference.

It is claimed that we failed to consider and pass upon questions of law raised by defendant's exceptions to the instructions referring to the third separate defense, and set forth in the thirteenth assignment of error in the reply brief. The principles of law involved in the second, third, and fourth objections to the instruction are the same that were made to other instructions, and were considered and passed upon adversely to defendant's contention. The correctness of the ruling has not been assailed, and we are satisfied that the instruction states the law correctly. The first objection is that the instruction gives undue weight and prominence to the evidence and theory of respondent. The instruction is intended to present plaintiff's theory of the case as to ratification by defendant of the alleged agreements by plaintiff to receive compensation from Hendricks, Snodgrass, and other landowners in violation of his duty to defendant. The substance of it is that, if the jury finds that plaintiff made such agreement, but afterwards with full knowledge of all the material facts, defendant accepted the benefits, he ratified the same, and it would not avail him as a defense. We find, however, that later on the court gave the substance of the same instruction from the defendant's theory of the case, without the element of ratification, and to the effect that if they found defendant's allegations as to plaintiff receiving compensation from both parties to be true, then plaintiff could not recover. The instructions fairly presented the theory of each party, and we think that there is no just ground for the objection. It is also urged in the motion that there is no evidence showing such ratification. It is sufficient to say that we have carefully re-examined the portions of the evidence to which our attention has been directed, and we are satisfied that there was evidence upon which to base the instruction, and it was proper to give it. Motion denied. AFFIRMED: REHEARING DENIED.

Argued May 6, decided July 27, 1909.

BOWMAN v. WADE.

[103 Pac. 72.]

FRAUDS, STATUTE OF—CONTRACT TO PAY MONEY—PART PERFORMANCE.

1. Where a defendant borrowed money from plaintiff under an agreement that the amount should stand as a loan for three years at ten per cent, and that the amount should be secured by a mortgage on real estate, such agreement, having been completely performed by plaintiff, was not within the statute of frauds as a contract not to be performed within a year.

FRAUDS, STATUTE OF—CONTRACTS IMPLIED—LOANS—UNENFORCEABLE CONTRACT.

2. Where plaintiff loaned money to defendant to be repaid with interest at ten per cent in three years, plaintiff was entitled to recover the sum loaned with legal interest in assumpsit for money received, though the contract was unenforceable under the statute of frauds.

ATTACHMENT—VACATION—TRAVERSE.

3. A party seeking to discharge an attachment by a traverse of the facts alleged, must deny every statutory ground alleged in the procuring affidavit in as direct and explicit terms as if it were an answer to a complaint.

EVIDENCE—SANITY—OPINION—REASON.

4. An opinion as to the sanity of the grantor by a subscribing witness to a mortgage was without weight, where it was limited to the witness' observation at the time of the taking the acknowledgment, and the witness did not give any reason for his opinion, as required by Section 718 B. & C. Comp.

INSANE PERSONS—VALIDITY OF MORTGAGE.

5. A mortgage by a grantor *non compos mentis*, without consideration, was void and not merely voidable.

ATTACHMENT—"SECURED CLAIM"—MORTGAGE BY NON COMPOS MENTIS.

6. Where plaintiff's debt was secured by the mortgage of a person *non compos mentis*, it was not a "secured claim" within the statute authorizing attachment (Section 296, B. & C. Comp.), providing for attachment in an action on a contract, express or implied, for the payment of money not secured by mortgage, loan, or pledge on real or personal property, or, if so secured, when such has been rendered nugatory by the act of the defendant.

INSANE PERSON—MORTGAGE—DISAFFIRMANCE—DUTY OF GUARDIAN.

7. The guardian of an insane person has no discretion to ratify a mortgage given by his ward, but is bound at his peril to disaffirm and avoid it.

From Umatilla: HENRY J. BEAN, Judge.

Statement by MR. JUSTICE SLATER.

Plaintiff, O. P. Bowman, brought this action on April 13, 1908, against Henry Wade, to recover money loaned to defendant, alleging, substantially: That in January, 1903, he loaned him the sum of \$300; that, when the same became due in April following, defendant solicited an additional loan of \$700; that on April 18th of that year

plaintiff loaned him the further sum of \$700 upon an agreement that the whole amount of \$1,000 should stand as a loan for three years from that date and should bear 10 per cent interest; that no part thereof, principal or interest, had been repaid; that at the time of making the additional loan defendant agreed to secure the payment of the entire amount by a mortgage upon real estate of ample value, and pursuant thereto he caused his son, William N. Wade, to execute and deliver to plaintiff a promissory note of that date for the amount of the loan, due in three years, with 10 per cent interest, and a mortgage on the southeast quarter and lots 11, 12, 19, and 20 of section 7, township 1 south, range 33 east, Willamette Meridian, in Umatilla County, containing 320 acres of land, to secure the note; that, at the time of procuring the loan and causing the note and mortgage to be executed and delivered as a pretended security and as an inducement therefor, defendant represented to plaintiff that he was possessed of the equitable title to such property, but that he had caused the legal title to be vested in his son, William N. Wade, to be held for the use and benefit of defendant, and at all times subject to be transferred, conveyed, or incumbered, as defendant might direct, and that he owned said property, had a good title thereto, and the right to cause the same to be conveyed or incumbered by his son; that said representations were false and fraudulent; that neither did defendant nor his son then, or at any time since, have any title or any right to incumber or convey the same; that, at the time of making the note and mortgage, William N. Wade was, and is now, an imbecile to such an extent as to be incompetent to take or hold the title to the lands described in the mortgage as trustee for the defendant, and was wholly incompetent and mentally incapable of transacting any business or of legally executing the note and mortgage; that he has no property out of which the amount of the note could be collected; that the note and

mortgage never were of any value, and never have been any security whatsoever for the payment of the loan made to the defendant; that these facts were fully known to, but concealed by defendant from plaintiff for the purpose of wronging and defrauding him, and procuring the loan without security, and preventing plaintiff from obtaining security by attachment; that plaintiff relied upon defendant's representations, and was thereby induced to make the loan, but by reason of the alleged facts the note and mortgage are a nullity, and plaintiff's claim is wholly unsecured. A formal tender of the note and mortgage, accompanied by an offer to cancel the mortgage of record, is made. After the commencement of the action, a writ of attachment was issued at the instance of plaintiff, and levied upon defendant's property, who thereafter, on April 28th, moved that the attachment be dissolved upon the alleged ground that the debt sued upon was secured by the collateral note and mortgage. Upon the same day, and before such motion was determined, plaintiff filed an amended affidavit in the support of his writ of attachment, as provided by Section 311, B. & C. Comp. The motion was denied on July 7th, whereupon defendant answered, denying the material averments of the complaint, except the giving of the note and mortgage as collateral security. Trial was had, resulting in a verdict and judgment for plaintiff for the sum of \$1,000 and interest at 6 per cent, and an order to sell the attached property, from which defendant appealed.

AFFIRMED.

For appellant there was a brief over the names of *Mr. Douglas W. Bailey* and *Mr. J. B. Perry*, with an oral argument by *Mr. Bailey*.

For respondent there was a brief over the names of *Messrs. Raley, Richards & Raley*, with oral arguments by *Mr. James H. Raley* and *Mr. N. C. Richards*.

MR. JUSTICE SLATER delivered the opinion of the court.

1. The first assignment of error relied upon by defendant for a reversal of the judgment is based upon the admission, over his objection and exception, of the parol testimony of the plaintiff of the circumstances of the making of the loan and defendant's agreement to repay the money three years after the date of the transaction. The substance of the objection is that the contract upon which the action is founded is one which was not by its terms to be performed within one year from the making thereof, and is within subdivision 1, Section 797, B. & C. Comp., commonly designated as the "statute of frauds." It appears from the testimony that no note or memorandum of the contract, expressing consideration, was made in writing subscribed by the defendant, and if the agreement is within the statute, as claimed by the defendant, it could not be established by parol testimony in an action to recover on such contract.

There is much disagreement among the authorities as to whether or not a complete performance of an agreement upon one side at the time of its making, the performance of which by the other party is not to take place within a year, will take the case out of the statute. It is said that the adjudicated cases are incapable of reconciliation on principle, but that the decided preponderance of authority is in favor of the validity of a parol contract which has been fully performed upon one side at or near the time of its making, although the execution thereof by the other party is deferred for a longer period than one year: Smith, Law of Fraud, § 352. And especially is this the case where the stipulation sought to be enforced related solely to the payment of a money consideration. In such cases it is a mere point of form in bringing the action; the plaintiff's right to recover on the *indebitatus assumpsit* being clear: Browne, Statute of Frauds (5 ed.), § 290; *Pierce v. Paine's Estate*, 28 Vt. 34; *Emery v. Smith*, 46 N. H. 151; *Durfee v. O'Brien*, 16

R. I. 213 (14 Atl. 857). A full citation and review of the authorities on both sides of this controverted question may be found in an extended footnote to section 352 on pages 436-447 of Mr. Smith's recent work on the Law of Fraud. After a careful perusal thereof, we are of the opinion that on principle and weight of authority the contract now under consideration is not within the statute. We are brought to this conclusion chiefly by what was said in *McClellan v. Sanford*, 26 Wis. 595. After stating the principle there involved—which is substantially the same as here—and the attitude of the authorities thereon, Mr. Chief Justice DIXON says: "It will be observed, on examining these cases, that in some the question was nearly identical with the present, except that the promise was not evidenced by anything written in the deed, and that in all it was held that a verbal promise to pay beyond the year, if made upon an executed consideration, whether lands conveyed or goods and chattels sold and delivered, or other consideration of value, is valid. The doctrine of these cases is that the provision of the statute now being considered applies only to contracts not to be performed on either side within the year. * * The cases holding to the opposite rule that, whilst they adhere to a strict and literal construction of the statute in order to close the door to the mischiefs which they suppose the statute was designed to prevent by excluding parol evidence after the lapse of one year, they yet seem to leave the door wide open to the same mischiefs by allowing parol evidence to be introduced to show what the contract was, and what was the price or sum agreed to be paid, for the purpose of enabling the promisee or creditor to recover upon a *quantum meruit* or *quantum valebat*. The advantage of this course of decision is not perceived, and, if it were, we should not be inclined to depart from a rule already laid down, especially when it is sustained by so much and such respectable authority." Substantially the same principle

is stated in *Durfee v. O'Brien*, 16 R. I. 213 (14 Atl. 857), that "If the recovery be upon a *quantum meruit* count, still the contract is admissible as evidence to show what the defendant admitted and declared the consideration to be worth."

2. It is conceded by counsel for defendant that, if plaintiff in fact loaned the money to defendant upon the terms stated in the complaint—which we must assume that the jury found—and that if it were held to be within the statute, yet he may recover, not upon the contract, but for money had and received, if the complaint be so framed; and this is undoubtedly held by many authorities, including *Keller v. Bley*, 15 Or. 433 (15 Pac. 705); *Pierce v. Paine's Estate*, 28 Vt. 34; *Swift v. Swift*, 46 Cal. 266; *Moody v. Smith*, 70 N. Y. 598; *Whipple v. Parker*, 29 Mich. 369; *Bennett v. Phelps*, 12 Minn. 326 (Gil. 216). The complaint states the fact of plaintiff's having paid the money to the defendant, and the purpose for which it was done, which negatives that the payment was made to liquidate any liability or obligation which the former owed to the latter, or that it was intended as a gift. Under such circumstances the law imposes an obligation to repay the same within a reasonable time, with legal interest. The verdict and judgment are for such an amount, and not for the amount of interest contracted to be paid. In our opinion the evidence was admissible, and in any view of the case there was no prejudicial error in admitting it.

The motion for a directed verdict involves the same theory of the defense, and it was therefore properly denied.

3. The remaining question for consideration is the refusal of the court to discharge the attachment. It was secured upon the plaintiff's affidavit, which states, in effect, that the debt claimed to be due had not been, and at the commencement of the action was not, secured by any mortgage, lien, or pledge upon real or personal prop-

erty. The facts with reference to the giving by William N. Wade, at the instance of defendant, of the note and mortgage as a pretended security for the debt, are set forth; but it is averred that the same were fraudulent and void at the time they were given, for the reasons that neither the defendant nor his son had any title, legal or equitable, to the premises attempted to be mortgaged, and that the son was at the time mentally incapable of contracting. The reasons assigned in the motion of the defendant for the dissolution of the attachment, with one exception, are mere generalities, such as: That the affidavit filed herein does not comply with the statute (but in what respect is not pointed out); that it appears from the amended complaint that plaintiff is not entitled to the writ; and that the action is not such a one as would entitle plaintiff to an attachment. But it is therein alleged that it appears from the amended complaint that plaintiff has a mortgage to secure the debt sued upon, and that the same is now existent. In support of the motion, the affidavits of William N. Wade and Joe H. Parks are filed. By the former it is attempted to be shown: That affiant is, and has been for several years, the owner of the mortgaged property; that he executed and delivered the note and mortgage mentioned in the complaint and delivered the same to plaintiff for the purpose of securing the payment of the money therein mentioned, and caused said mortgage to be recorded; that at no time has he sought to rescind or avoid the mortgage, or repudiate the contract thereby created; that he does not intend to rescind or repudiate it; and that he has paid taxes upon the mortgaged land since he owned it, which is evidenced by four tax receipts appended as exhibits. The affidavit of Parks is to the effect that he is a notary, and that he took Wade's acknowledgment of the execution of the mortgage, concluding with this statement: "That the said William N. Wade, at the time he

acknowledged said instrument, appeared to be, and so far as I could observe was, in possession of all his faculties, and well able and capable of executing contracts."

When a party seeks to have an attachment discharged by a traverse of the facts alleged in plaintiff's affidavit, it is well settled that the traversing affidavit or plea must deny every statutory ground alleged in the procuring affidavit in as direct and explicit terms as if it were an answer to a complaint, and must be tested by the same rules: *Watson v. Loewenberg*, 34 Or. 323 (56 Pac. 289). The plaintiff's position, as set forth in his affidavit, is that the contract upon which he sues, whether express or implied, is for the direct payment of money, and that it is not secured by a mortgage, although it is confessed that a note and mortgage in form upon real property were given as collateral security; but it is averred that the giving of this note and mortgage, and procuring him to accept them, was a fraud, that neither the defendant nor his son had any title to the land or interest therein that could be mortgaged, and that the son, who executed the note and mortgage, was at that time, and is now, a mental imbecile to such an extent that he was and is incompetent to contract. None of these averments are attempted to be met and refuted expressly by the defendant, except the one asserting the lack of title, and this only by the affidavit of the alleged incompetent, William N. Wade, who therein claims to own the land in his own right, without limitation as to the *quantum* of his interest. If any evidentiary value at all can be given to this affidavit, it can go no further than to prove that whatever interest he had in the land he held in his own right, and not as trustee for his father; but we are of the opinion that, because of Wade's lack of mentality, which is conclusively established, this affidavit should be given little or no weight.

4. Apparently the affidavit of Parks was offered as some sort of proof of the mental soundness of William

N. Wade; but, at the utmost, this goes only to the general appearance of the latter at the time that he acknowledged the mortgage. The opinion expressed by the affiant is limited by the words, "so far as I could observe." His opportunity for observing was evidently limited to the time occupied in executing and acknowledging the instrument. Wade executed the note and mortgage by making his mark, although he was then a young man beyond his majority. Parks was an attesting witness. The statute (Section 718, B. & C. Comp.) provides that upon a trial evidence may be given of "the opinion of a subscribing witness to a writing, the validity of which is in dispute, respecting the mental sanity of the signer, and the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given." Parks did not claim in his affidavit that he had any acquaintance with Wade, and his only qualification as witness to Wade's sanity is that he was a subscribing witness to the execution of the mortgage; but, if what he has said on the subject can be construed to be an opinion as to the mental soundness of Wade, he has failed to give any substantial reason for such opinion.

5. Opposed to this affidavit is that of the plaintiff, corroborated by the affidavits of three citizens, each of whom have sworn that he has known William N. Wade from five to nine years, and two of whom lived neighbors to him; that he was generally known as "crazy" Wade; that during that time he has been an imbecile and incapable of transacting business or of carrying on an intelligent conversation; that he does not appear to be as bright as an ordinary child five years old; that seven or eight years before he was committed to the insane asylum, but returned in a short time, and since his return he has been no better than before. One of these affiants says he has seen young Wade frequently, and attempted to converse with him, but that he was totally unable to carry on an intelligent conversation, or to understand the nature of

a contract, or to negotiate or conduct business of any kind or character; that he was unable to look after and care for himself, and would wander away from home, when it would be necessary for some one to come after him, or some one to take him home. Under this state of facts, it cannot be held otherwise than that William N. Wade was at the date of the execution of the note and mortgage, and ever since then has been, an imbecile to such an extent that he was and is wholly incompetent to comprehend or transact ordinary business or to make a binding contract. Indeed, that conclusion does not appear to be controverted by the defendant.

Now, if William N. Wade ever had any title or interest in this land sufficient to be mortgaged, the record shows he held it in his own right, and not as trustee. It appears to have been purchased at private sale from the United States government as a part of the Umatilla Reservation under Act Cong. March 3, 1885, c. 319 (23 Stat. 340), and Act. Cong. July 1, 1902, c. 1380 (32 Stat. 730), the southeast quarter by Charles Sevey, a brother-in-law, and lots 11, 12, 19, and 20, by Rose Carroll, a sister of William. This is shown by the duplicate receipts under date of March 12, 1903, and the second and third payments. On April 4, 1903, a few days before the execution of the note and mortgage in question, each of these purchasers, for the expressed consideration of \$500, conveyed the land to William N. Wade by bargain and sale deeds, with a warranty against incumbrances and to defend the same against the lawful claims and demands of all persons. From the affidavit of F. C. Bramwell, acting register of the United States Land Office at La Grande, it appears that Sevey's entry, as the result of a contest, was held for cancellation April 8, 1908, and Rose Carroll's entry was finally canceled and the land resold March 3, 1907, to Frederick Shoemaker. There is no proof that William N. Wade took any other title than that disclosed by these deeds. It is true that plaintiff

- has testified that Henry Wade, the defendant, told him that he in fact owned the land, and that his son held it in trust for him; but this is not evidence of the fact. It merely concedes that at the inception of the transaction a claim of that character was made by the defendant; but the tenor of the deeds by means of which William obtained whatever title he possessed disproves the claim; but, as we view the law, it cannot be material in this case how he held it.

In *Farley v. Parker*, 6 Or. 105 (25 Am. Rep. 504), this court has held that the deed of a person *non compos mentis* is void. This conclusion is supported by a respectable line of authority, including the cases of *Dexter v. Hall*, 15 Wall. (U. S.) 20 (21 L. Ed. 73), and *Van Deusen v. Sweet*, 51 N. Y. 378. There are many cases, however, which treat the deeds and contracts of infants and persons *non compos mentis* as merely voidable, and not as absolutely void: *Key's Lessee v. Davis*, 1 Md. 32; *Burnham v. Kidwell*, 113 Ill. 425; *Evans v. Horan*, 52 Md. 602; *Allis v. Billings*, 6 Metc. (Mass.) 419 (39 Am. Dec. 744); *Riggan v. Green*, 80 N. C. 236 (30 Am. Rep. 77). But conveyances without consideration have been held absolutely void: *Clerk v. Clerk*, 2 Vern. 412; *Elliot v. Ince*, 7 De G., M. & G. 475; *Roddy v. Williams*, 3 Jones & L. 1. But even though this contract be considered as merely voidable, and not void, still it could be avoided at the election of the incompetent if he should recover, or by his guardian if one should be appointed, or by his legal representative, or his heirs. It is only contracts based upon an adequate consideration of which the incompetent has had the benefit, and made by the other contracting party in good faith, without fraud or undue influence, and without knowledge of the insanity, or reason to suspect it, that will be upheld against the incompetent: 16 Am. & Eng. Enc. Law (2 ed.) 625. And this contract is not of that character.

6. Can the plaintiff's claim be said to be secured by a note and mortgage burdened with such infirmities? The policy of the law is that a creditor holding a security by way of "mortgage, lien, or pledge, upon real or personal property," shall not resort to the summary process of attachment until he has exhausted his security; but such lien or pledge must be of a fixed, determinate character, capable of being enforced with certainty and depending on no conditions: *Porter v. Brooks*, 35 Cal. 199; *Watson v. Loewenberg*, 34 Or. 329, 336 (56 Pac. 289).

7. If the plaintiff should undertake to enforce this security in any manner, he could do so only after the appointment of a guardian for William N. Wade by some competent court, and it would not be within the discretion of such guardian to ratify and affirm the validity of this security as against his ward; but he would be bound at his peril to disaffirm and avoid it.

Under these circumstances, it cannot be said that plaintiff had security for his debt, and there was no error in refusing to discharge the attachment.

The judgment is affirmed.

AFFIRMED.

MR. JUSTICE KING delivered the following dissenting opinion:

I am unable to concur with that part of the opinion holding that, under the circumstances presented by the record, an attachment will lie. I regard it as a well-established rule that, unless the statute expressly provides for a liberal construction, all enactments relative to attachments must be strictly construed, and may not be extended by implication or interpretation. Our statute makes no provision for an exception to this rule, with reference to which Mr. Justice STRAHAN, in *Case v. Noyes*, 16 Or. 329, 333 (19 Pac. 104, 106), referring to provisions of the code upon the question, remarks: "The court has no power to enlarge or extend them beyond the letter of the statute." Similar enactments were under

consideration by the Supreme Court of New Jersey in *Van Emburgh v. Pullinger*, 16 N. J. Law 457, concerning which the court say: "The proceeding by attachment is altogether a statutory remedy, and, if it fails to reach the case of an insolvent debtor, we cannot extend it to him by construction." The Supreme Court of Michigan, having the same question under consideration, observes: "As said at the outset, attachment is a harsh and extraordinary remedy. The law may well restrict its use. * * It is common knowledge that few men or firms can survive an attack by attachment. It is the almost certain precursor of insolvency, as in former days it was of bankruptcy, and we should hesitate before broadening the scope of the act in question": *Jaffrey v. Jennings*, 101 Mich. 515, 522 (60 N. W. 52, 54: 25 L. R. A. 645). The Court of Appeals of New York, in *Penoyar v. Kelsey*, 150 N. Y. 77, 80 (44 N. E. 788, 789: 34 L. R. A. 248), in announcing the law relative to attachments in that state, gives its conclusion thus: "Owing to the statutory origin and harsh nature of this remedy, the section in question should be construed, in accordance with the general rule applicable to statutes in derogation of the common law, strictly in favor of those against whom it may be employed." For a collation of the authorities of many states, including Oregon, holding to the above effect, see 4 Cyc. 400, 401.

The conditions under which an attachment may be made a lien upon the property of the debtor are clearly circumscribed in Sections 296, 297, B. & C. Comp, the enumeration of which provisions with reference thereto, under all rules of statutory construction, excludes all others not there specified. Plaintiff has not brought himself within any of the requirements indicated in those sections. The note and mortgage securing it accepted by him as security for the loan are regular in form, and properly executed, and the record does not disclose that they have been "rendered nugatory by the act of the

defendant." If not invalid when executed, no act of the defendant or of any other person since the execution of the instruments has rendered them ineffective, at least so far as appears from the record. The instruments held by plaintiff as collateral security for the debt sued upon are *prima facie* what they purport to be, and I do not believe it comes within either the letter or spirit of the statute to permit an attaching creditor in a collateral proceeding to have it determined that instruments of this character, regular upon their face, properly executed, and under seal, are null and void—either to the extent of holding that the mortgagor was an imbecile at the time of the execution of the mortgage and note, or to adjudge him not to be the owner of the property mortgaged.

Unless it appears that the mortgagor at the time of the execution of the instruments was adjudged insane, or otherwise incompetent, and was at that time under such disability, then I think, under the most favorable view to plaintiff, the instruments executed by him are voidable only, and are in full force and effect until annulled in some direct proceeding instituted in the proper forum and by the proper party for that purpose: *Coburn v. Raymond*, 76 Conn. 484 (57 Atl. 116: 100 Am. St. Rep. 1000); *Eaton v. Eaton*, 37 N. J. Law, 108 (18 Am. Rep. 716); *Blinn v. Schwarz*, 177 N. Y. 252 (69 N. E. 542: 101 Am. St. Rep. 806); *French L. Co. v. Theriault*, 107 Wis. 627 (83 N. W. 927: 51 L. R. A. 910: 81 Am. St. Rep. 856); *Riggan v. Green*, 80 N. C. 236 (30 Am. Rep. 77); *Carrier v. Sears*, 4 Allen (Mass.) 336 (81 Am. Dec. 707); *Ashcraft v. De Armond*, 44 Iowa 229; *Swartwood v. Chance*, 131 Iowa 714 (109 N. W. 297).

True, it is disclosed that Wade was at one time adjudged insane and committed to an asylum; but it also appears that he was subsequently discharged, thereby overcoming any presumption against him by reason of such commitment, and, until otherwise declared

by some direct proceeding instituted for that purpose, he must be presumed to have been competent, or sane, when the instruments, here collaterally attacked, were executed.

So far as appears from the record, no steps have been taken to annul the instruments held as collateral; nor does it appear that the alleged imbecile, or any one appearing in his behalf by and proceeding, directly, indirectly, or otherwise, in any manner disputes their sufficiency, or that the title to the land mortgaged is in any way brought in question, except by the method here under consideration.

Being of the opinion that the trial court was in error in not dissolving the attachment, I dissent from the conclusion announced by the majority on this point.

Argued July 21, decided August 3, 1909.

STATE v. JANCIGAJ.

[103 Pac. 54.]

CRIMINAL LAW—APPEAL—REVIEW OF INSTRUCTIONS—RECORD.

1. Where the evidence is not in the record, the court must assume that instructions correctly stating the law were justified by the evidence possible under the pleadings; but, where no possible state of the evidence justified the instructions, the giving of them was error.

CRIMINAL LAW—INSTRUCTIONS—CONSTRUCTION AS A WHOLE—"DELIBERATE"—PRESUMPTIONS AS TO MALICE.

2. Under Section 787, B. & O. Comp., providing that an intent to murder arises from the deliberate use of a deadly weapon, causing death, etc., and Section 1754, relating to the evidence of malice and premeditation in murder in the first degree, an instruction that the law conclusively presumes malice "from the deliberate and unlawful use of a deadly weapon," but does not conclusively presume that the killing is murder in any degree, followed by a charge that to constitute murder in the first degree there must be some other evidence than the mere fact of killing, sufficiently protects the rights of accused, relying on the defense of insanity, for the word "deliberate" means to weigh the motives for an act, its consequences, the nature of the crime, or the things connected with the intention, with a view to a decision thereon and implies that accused was capable of the exercise of mental powers.

From Clackamas: THOMAS A. MCBRIDE, Judge.

The defendant, Math Jancigaj, was indicted, tried, and convicted of the crime of murder in the first degree, and from the judgment and sentence which followed, he appeals.

AFFIRMED.

For appellant there was a brief over the names of *Messrs. Dimick & Dimick*, and *Mr. James U. Campbell*, with oral arguments by *Mr. W. A. Dimick* and *Mr. Campbell*.

For the State there was a brief and an oral argument by *Mr. Edmund B. Tongue*, District Attorney.

MR. JUSTICE SLATER delivered the opinion of the court.

The defendant was indicted, tried, and convicted of murder in the first degree for the killing of Mary Smrekar on the 11th day of July, 1908, by shooting her with a pistol, and from the judgment thereon he has appealed.

1. The trial court gave this instruction:

"The law conclusively presumes malice from the deliberate and unlawful use of a deadly weapon causing death within a year."

The defendant excepted to the instruction and requested the court also to add to and give as a part thereof the following:

"But this conclusive presumption, standing alone, is insufficient to sustain a verdict of murder in the first degree."

The court refused to instruct as requested, but gave this:

"The law conclusively presumes malice from the deliberate and unlawful use of a deadly weapon causing death within a year; but it does not conclusively presume that the killing under such circumstances is murder in the first degree, or in any degree. (To counsel) I think this covers your suggestion. (To the jury) The law does not presume the degree of the offense from the mere fact of the deliberate unlawful use of a weapon."

And to this instruction defendant also excepted. The giving of these instructions, and the exceptions taken, comprehend the entire matter set forth in the bill of exceptions; but there is attached as an exhibit so much of the instructions of the court as pertained to defining

the necessary elements of the different degrees of murder, of manslaughter, and of malice. No part of the evidence adduced at the trial is given, nor the import or tendency thereof. Under such a state of the record, the appellate court must assume, so far as the correctness of the instructions given is to be determined by reference to facts proved at the trial, that such evidence was given and such facts established as justified the giving of the instructions. *State v. Yan Yan*, 10 Or. 365; *State v. Magers*, 35 Or. 520, 527 (57 Pac. 197). And if the instruction upon which error is based contains a correct statement of the law and is applicable to some state of the case possible under the pleadings, error cannot be based thereon; but if upon no state of the evidence which can be supposed to have been before the court and jury would the charge have been a correct statement of the law, then the giving of such charge would constitute error. *Keating v. State*, 44 Ind. 450; *Parker v. Montieth*, 7 Or. 277.

2. The statute (subdivisions 1 and 2, Section 787, B. & C. Comp.) provides that the following presumptions, among others, are deemed conclusive:

"(1) An intent to murder, from the deliberate use of a deadly weapon, causing death within a year; (2) a malicious and guilty intent, from the deliberate commission of an unlawful act, for the purpose of injuring another."

In *State v. Carver*, 22 Or. 602 (30 Pac. 315), where the defendant was charged with the crime of murder in the first degree, this court considered the effect of the first of these presumptions in connection with Section 1754, B. & C. Comp., which provides that:

"There shall be some other evidence of malice than the mere proof of the killing to constitute murder in the first degree, unless the killing was effected in the commission or attempt to commit a felony; and deliberation and premeditation, when necessary to constitute murder in the first degree, shall be evidenced by poisoning, lying in wait, or some other proof that the design was formed

and matured in cool blood, and not hastily upon the occasion."

It was there held that the presumption of an intent to murder declared to be conclusive by the statute applies only to murder in the second degree, and has no application to murder in the first degree; but to constitute proof of this crime there must be some affirmative evidence of deliberation and premeditation. And in *State v. Gibson*, 43 Or. 184 (73 Pac. 333), it was held that the provisions of Section 1754, B. & C. Comp., are a limitation upon the presumption declared by the statute, and confine its operation to murder in the second degree; but it was also held in that case that, even as to that degree of crime, the presumption there declared is not always conclusive of the intent, but is so only when nothing else appears in evidence either to justify or excuse the act, that it was intended to apply only where the mere fact of the killing with a deadly weapon deliberately used is shown, without else to modify or explain the act, and, when there is evidence tending to rebut the presumption, it becomes a matter for the jury to determine. The instruction, of which complaint is made in the case at bar, is not in the language of the statute, nor is it by any means so comprehensive. "An intent to murder" is the presumption raised by the statute; but that of the instruction given is only "malice," not premeditated malice necessary to murder in the first degree, but malice present at the commission of the act, an element of murder in the second degree. By the statute the presumption of "intent to murder" is raised from the deliberate use of a deadly weapon causing death within a year, while by the instruction given the presumption of "malice" was said to follow from proof of the deliberate and unlawful use of a deadly weapon, etc. By the addition of the word "unlawful," the court materially relaxed the severity of the statute upon the defendant, and safeguarded his rights, because the pre-

sumption spoken of could not be said to exist, until the jury had found from the evidence an unlawful use of a deadly weapon.

Moreover, to further guard the rights of the defendant, and in lieu of the suggestion of his counsel, the court modified the instruction as first given, by adding to it that the law "does not conclusively presume that the killing under such circumstances is murder in the first degree, or in any degree." This of itself was sufficient to eliminate any possible error. *State v. Bartmess*, 33 Or. 110, 130 (54 Pac. 167). On the other hand, when giving the elements necessary to establish murder in the first degree, the court was careful that there should be no misapprehension in the minds of the jury in relying upon any presumption of malice when considering that degree of crime, for they were instructed that the law also requires, in order to constitute murder in the first degree, that there shall be some other evidence than the mere fact of the killing, to wit, that the design had been formed and matured in cool blood, and not hastily on the occasion, and, unless it was so formed and matured in cool blood, there could be no murder in the first degree. The instruction complained of, not only by its terms, but when taken in connection with the remainder of the charge, was clearly limited to degrees of crime less than murder in the first degree.

It is urged, however, that, as the defense of insanity was interposed, there must have been some evidence to modify and explain the act, and therefore to rebut the presumption of malice, and for that reason, under the rule announced in *State v. Gibson*, 43 Or. 184 (73 Pac. 333), the existence of malice was a question for the jury to weigh and determine, and not one of law for the court, and that the giving of the instruction was inappropriate and erroneous. The portion of the instructions appended to the bill of exceptions as Exhibit A contains some propositions of law applicable to such a

defense said therein to be "among the defenses suggested in this case." If the giving of such instructions had been excepted to and were assailed here as constituting error, we would be bound to assume, in the absence of any evidence in the record, that there was evidence of that character introduced; but, giving the defendant the benefit of the assumption that evidence of that character was offered, yet we think the instruction of which complaint is made was so framed as to exclude the indulgence of the presumption, if such were the case. The act constituting the basis of the presumption must have been deliberate; that is, accompanied by such circumstances as evidence a mind fully conscious of its own purpose and design. Anderson's Law Dict., title, "Deliberation": *Commonwealth v. Drum*, 58 Pa. 9, 16. To "deliberate" is to weigh the motives for the act, its consequences, the nature of the crime, or the things connected with the intention, with a view to a decision thereon. It implies that the perpetrator must be capable of the exercise of such mental powers as are called into use by the consideration and weighing of the motives and the consequences of the act, and it implies the possession of a mind capable of conceiving a purpose to act. Words and Phrases, vol 2, p. 1953. The effect of the instruction therefore was to require of the jury the consideration of any evidence that might have been offered which tended to support such a defense, and to find against the defendant thereon, before the presumption of malice could be indulged.

It necessarily follows from these considerations that the judgment must be affirmed, and it is so ordered.

AFFIRMED.

MR. JUSTICE MCBRIDE, having presided in the trial below, did not participate in this decision.

Argued July 27, decided August 10, 1909.

STATE v. TURPIN.

[108 Pac. 488.]

CRIMINAL LAW — TERMINATION OF TRIAL — DISCHARGE OF DUTY —
ACQUITTAL.

Section 953, B. & C. Comp., provides that, if no judge attends on the day appointed for holding a court before 4 o'clock in the afternoon, the court shall stand adjourned until the next day at 9 o'clock, and if no judge attend on that day before 4 o'clock in the afternoon, it shall then stand adjourned for the term. Defendant's trial was commenced on October 28, 1907, the jury impaneled and testimony taken, but the next day, while counsel were proceeding with their argument, information was received that the Governor had proclaimed that day a legal holiday, whereupon the jury were allowed to separate until the next judicial day. A succession of holiday proclamations followed each day until the 5th of December, when an interval of three days ensued, during which no holidays were proclaimed. On December 8th holidays were again proclaimed, and continued until December 14th. *Held* that, no court having convened during the three days' interval between the holidays declared, the court stood adjourned for the term, which operated as an acquittal, under the rule that a discharge of the jury without legal necessity therefor, before verdict, amounts to an acquittal.

From Linn: GEORGE H. BURNETT, Judge.

Statement by MR. JUSTICE MCBRIDE.

Ralph Turpin was arrested and brought before a justice of the peace in Linn County, and by his order held to answer before the circuit court for the crime of rape. He gave the usual statutory undertaking of bail in the sum of \$1,000, with J. H. Turpin, C. H. Devine and J. C. Devine as sureties, for his appearance at the trial of said cause in the circuit court. On the 24th of June, 1907, he was duly informed against for said crime of rape, and arraigned on said charge, and thereafter filed his plea of not guilty thereto. On October 28, 1907, the cause came on for trial, a jury was impaneled, and the testimony taken. The next day, while counsel were proceeding with their argument, information was received that the Governor had proclaimed that day a legal holiday, and the jury were allowed to separate until the next judicial day. A succession of holiday proclamations followed each day until the 5th day of December, 1907, when an interval of three days ensued, during which no holidays were proclaimed. On the 8th day of December

the Governor again issued a proclamation declaring that day a legal holiday, and continued so to do until December 14, 1907. No court convened during the three days' interval above mentioned. On the 20th day of January, 1908, the court made an order directing the sheriff to cause defendant Turpin to be present in court on the 24th day of January, 1908, and ordered that he be prepared to resume the trial on that day. On the day appointed for the trial the court convened, with the jury all present, but the defendant failed to appear, and, after taking the testimony of the sheriff—which was to the effect that he could not find the defendant after diligent search, and that he had fled the State—the jury were excused from further attendance on the court. On the 27th day of January, 1908 the court met in special session, by virtue of an order calling a special term of said court, and at the said special term the cause was continued by consent of the parties till the next regular term. On March 9, 1908, being the next regular term, the case was called for trial, but the defendant failed to appear, and his default was duly noted, and his undertaking of bail declared forfeited. Thereupon this action was commenced to recover \$1,000, the amount of his undertaking of bail. The complaint is in the usual form.

Defendant's answer, among other things, showed the various adjournments of court, the various holiday proclamations of the Governor, the fact that three judicial days had intervened in which no court had been held; and claimed that by reason of the failure of the court and jury to convene during the three judicial days intervening between October 29, 1907, and December 14, 1907, the jury was discharged, and that, having been once in jeopardy, he could not thereafter be tried for this offense.

A reply denied the new matter in the answer. The plaintiff moved for judgment on the pleadings, which was granted, and from this judgment defendants appeal.

REVERSED.

For appellants there was a brief over the names of *Messrs. Weatherford & Wyatt*, and *Mr. N. M. Newport*, with oral arguments by *Mr. James K. Weatherford* and *Mr. Newport*.

For the State there was a brief over the names of *Mr. John H. McNary*, District Attorney, and *Mr. Gale S. Hill*, Deputy District Attorney, with an oral argument by *Mr. Hill*.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

Several questions are raised in this appeal; but, for the reasons hereinafter indicated, we think that there is one which decisively settles the case, and renders it unnecessary to consider the others. The jury were permitted to separate on the 29th day of October, 1907, the first day proclaimed as a public holiday. On the 5th, 6th, and 7th days of December no proclamations were issued, and these were judicial days. No judge was in attendance, and no court held on either of these days. In consequence of this failure to hold the court it stood adjourned for the term, and the jury were discharged. Section 953, B. & C. Comp., is as follows:

"If no judge attend on the day appointed for holding a court, before four o'clock in the afternoon, the court shall stand adjourned until the next day at nine o'clock; and if no judge attend on that day, before four o'clock in the afternoon, it shall then stand adjourned for the term."

A discharge of the jury without a legal necessity therefor, before verdict, will have the legal effect of an acquittal. *State v. Richardson*, 47 S. C. 166 (25 S. E. 220: 35 L. R. A. 238); *Teat v. State*, 53 Miss. 439 (24 Am. Rep. 708); *State v. Smith*, 44 Kan. 75 (24 Pac. 84: 8 L. R. A. 774: 21 Am. St. Rep. 266); *State v. Nelson*, 19 R. I. 467 (34 Atl. 990: 33 L. R. A. 559: 61 Am. St. Rep. 780); *Commonwealth v. Fitzpatrick*, 121 Pa. 109 (15 Atl. 466: 1 L. R. A. 451: 6 Am. St. Rep. 757).

The defendant having therefore been substantially acquitted by the discharge of the jury, without any physical or legal reason therefor, his presence in court at any subsequent time was not required.

It is fair to the court below to say that this condition of affairs arose from an oversight on the part of the Governor in not notifying the public that the holidays would cease, so that both judge and jury failed to discover any change from the regular holiday system that had theretofore prevailed since October 29th, and which was again resumed on December 8th. But this fact could not change the effect of the law in this regard, nor the status of the defendant. It has been repeatedly held that, whether the discharge of the jury arose from the arbitrary act of the court, or from some mere whim or caprice of judge or jury, or from some accident or blunder, it was immaterial; in either case the result would be the same—the discharge of the defendant. In *Teat v. State*, 53 Miss. 439 (24 Am. Rep. 708), the rule is stated as follows: "But if an acquittal would ensue by operation of law from a discharge proceeding from tyranny, it must spring also from one proceeding from mere whim or caprice; and, if from the latter, then equally will it follow where the discharge of the jury has been caused by some blunder or accident with which the accused had no connection."

It follows from these views that the court below erred in rendering judgment in favor of plaintiff and against the defendant, and its action is reversed, and the cause remanded, with directions to proceed in a manner not inconsistent with this opinion.

REVERSED.

Argued August 3, decided August 17, 1909.

STATE v. WALSWORTH.

[108 Pac. 516.]

HOMICIDE—DEFENSE OF RELATIVE—INSTRUCTIONS.

1. Defendants, father and son, were indicted for murder. The son, who fired the fatal shot, testified that, after his father had held up his hands in token of submission, deceased and his relatives continued shooting into the house where the son found his father wounded and covered with blood, and, believing that his mother was also in the house, he picked up his father's rifle and fired the fatal shot, believing his own life and that of his mother to be in danger. *Held*, that the court's failure to charge on the son's right to protect his mother from danger from an alleged unjustifiable attack on the house by deceased and his brother, was error.

HOMICIDE—DEFENSE OF RELATIVE.

2. Where one of the defendants honestly believed that his mother was in the house when deceased continued to shoot at or into the house without apparent necessity, defendant was entitled to act on appearances, and if the circumstances were such as would have led a reasonably prudent man to believe, and he did believe, that his mother's life was in danger, he was entitled to shoot in her defense.

HOMICIDE—EVIDENCE—THREATS.

3. Where a killing is not deliberate and not in cool blood, previous threats made by one defendant are not evidence against a codefendant who had no knowledge thereof.

CRIMINAL LAW—INSTRUCTIONS—THREATS.

4. Defendants' requested instruction, that evidence of threats against decedent's family could not be considered as against one of the defendants not shown to have had any knowledge thereof, was properly refused, where it further stated that, if the jury were satisfied from the evidence as to which party commenced the affray, they could not consider the evidence of threats as against either defendant; the court not being authorized to charge that, if one item of relevant evidence satisfies the jury's mind on a given point, another item on the same point may be rejected.

From Jackson: HIERO K. HANNA, Judge.

Statement by MR. JUSTICE MCBRIDE.

The defendants, Charles H. Walsworth and Norval Walsworth, were jointly informed against at the March term, 1908, of the circuit court of Jackson County, Oregon, for the crime of murder in the first degree, alleged to have been committed upon the person of James F. Mankin. They were jointly tried, and a verdict of guilty of murder in the second degree was rendered by the jury against each of them. Following this verdict they were sentenced to a term in the penitentiary for the period of their natural lives, and it is from this

judgment of conviction and sentence that they prosecute this appeal.

The State's testimony tended to show that defendants, Charles H. Walsworth and Norval Walsworth, are father and son, and that James F. Mankin, Henry Mankin and Carroll Mankin are brothers, and owned a small house, situated near the one in which they resided, and this house was occupied at the time of the homicide by the defendant Charles H. Walsworth and his family, consisting of the defendants and Elizabeth Walsworth, the wife of defendant, Charles H. Walsworth. On the day of the homicide, Henry Mankin came to the place where defendants were, for the purpose of serving upon the defendant, Charles H. Walsworth, a notice to quit the premises then occupied by him. The bill of exceptions shows that he went about his errand in a peaceable manner, and politely tendered the notice to quit to the defendant, Charles H. Walsworth. Thereupon this defendant engaged in a dispute with the said Henry Mankin and made an indecent remark to him in regard to the service of the paper. Thereupon the said defendant Walsworth drew a pitchfork in threatening manner, and with this instrument he then threatened Henry Mankin. At this point Henry Mankin picked up a club, and, while these two men were facing and cursing each other, Carroll Mankin approached the scene, carrying in his hand a walking stick, which he was using as a cane. Whereupon the defendant, Charles H. Walsworth cried: "Its guns, guns you sons of bitches want, is it?" and ran to the house carrying his pitchfork with him. As soon as defendant, Charles H. Walsworth, started for the house, defendants, Norval Walsworth, Bert Illingsworth, and Henry Mankin all called out to Charles H. Walsworth that said Carroll Mankin had no gun, but that it was a stick. There is no evidence in the bill of exceptions to dispute the above statement.

The evidence of the State tends to show that at this time Henry Mankin, Bert Illingsworth, and Carroll Mankin were all unarmed, and none were armed until after defendant, Charles H. Walsworth, had fired the first shot. Norval Walsworth ran after his father and followed him into the house. The defendant, Charles H. Walsworth, then appeared in the doorway and fired a shot from a rifle at Henry Mankin and James F. Mankin, who had just come unarmed upon the scene. At this point in the conflict, Belle Mankin, a sister of Henry, brought out from the Mankin house, first a shotgun, and then a rifle; the shotgun being delivered to James F. Mankin and the rifle to Henry Mankin. Before the guns were delivered to either of said persons, the defendant, Charles H. Walsworth, again fired a gun at said Henry Mankin and James F. Mankin. During all of this time, defendant, Norval Walsworth, remained in said house, and after the second shot was fired by his father he ran from the house and hid behind a corner thereof, from which point he presented a rifle at said James F. Mankin. Whereupon James F. Mankin fired two shots, one at defendant Charles H. Walsworth, and one at defendant, Norval Walsworth, and at the same time that these two shots were fired, and coincident therewith, Norval Walsworth fired a shot at James F. Mankin with a gun, and the undisputed evidence shows that this was the shot that killed James F. Mankin on the date named in the indictment and within Jackson County, Oregon. The shot fired by James F. Mankin at Norval Walsworth, wounded the said Norval Walsworth in the face.

The evidence of the State tended to show that, after the shooting was all over, the witness Floyd Dyer went to the front door of the Walsworth house and found defendant, Charles H. Walsworth, lying wounded in the doorway with a 38-caliber Winchester rifle lying by his side. The evidence of the State further tended to show that Norval Walsworth fired the shot the killed James

F. Mankin with a 32-40 caliber Marlin rifle, and this was the same gun with which the defendant, Charles H. Walsworth, fired the first shot. The evidence of the State further tended to show: That, after James F. Mankin was killed, his brother, Henry Mankin, went to the door of the house in which the defendant, Charles H. Walsworth, was; that both men were armed with guns and faced each other and presented said guns at each other; that thereupon Henry Mankin fired, and said shot took effect and wounded Charles H. Walsworth in the head. The evidence of the State further tended to show that, after the shooting was over, defendants and each of them told the arresting officer, upon separate occasions, that they had each killed the deceased, James F. Mankin. The evidence of the State further shows that, on the day prior to the homicide, the defendant, Charles H. Walsworth, had made divers and sundry threats to do great bodily injury and harm to members of the Mankin family, and James F. Mankin, and Henry Mankin. There was no evidence to show that Norval Walsworth was ever present when such threats were made, or knew of their being made, but defendant, Norval Walsworth, while on the stand, testified to nothing concerning these threats or his knowledge thereof.

To rebut this evidence, defendants testified in their own behalf: That, when James F. Mankin came upon the premises where the defendants were, the said defendant, Charles H. Walsworth, went to the house, about 40 yards, where he met the Mankins, and came to the door with a rifle, and, while standing in the door, said gun was accidentally discharged. That when the same was discharged the defendant went into the house and laid the gun on the bed and came to the door of the house and held up his hands, as a token of submission, and requested James F. Mankin not to shoot. At that moment he was fired upon by James F. Mankin, with a shotgun, the shot from which wounded the said Charles

H. Walsworth. That he returned to the house and sat down, and while in the house Norval Walsworth entered the house and found his father wounded and covered with blood, and he procured the rifle his father had laid on the bed and went out of the back door of the house. That when he appeared at the corner of said house he was fired upon by James F. Mankin, at a distance of about 30 yards, and at the same time he fired the shot which killed James F. Mankin. The defendants further offered testimony to the effect that Elizabeth Walsworth, the wife of Charles H. Walsworth, and mother of Norval Walsworth, at the very beginning of the affray, left the house, being the scene of the homicide, and went to the home of a neighbor, some distance away, and it was from there she heard the first shot fired; but her son, Norval, testified that during the affray he believed his mother to be in the house, and that he fired the shot which killed James F. Mankin, because he believed his mother's life was in danger for the reason that James F. Mankin and Henry Mankin were shooting at said house and into the same.

REVERSED.

For appellants there was a brief over the names of *Mr. Robert G. Smith*, *Mr. E. E. Kelly*, and *Mr. H. L. De Armond*, with an oral argument by *Mr. Smith*.

For the State there was a brief over the names of *Mr. B. F. Mulkey*, District Attorney, *Mr. Andrew M. Crawford*, Attorney-General, and *Messrs. Colvig & Reames*, with an oral argument by *Mr. Clarence L. Reames*.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

1. As will appear by the foregoing statement, the testimony on the trial was very conflicting. It is such as to leave little doubt that defendant, Charles H. Walsworth, originally began the affray which finally terminated in the death of James F. Mankin. There was some testimony, however, tending to show that after Charles

H. Walsworth had ceased from the affray and gone into the house, and thereafter returned to the door and held up his hands in token of submission, the deceased and his relatives followed up the conflict and continued firing. The whole of the testimony in detail is not before us; but the bill of exceptions shows that there was enough along the line above indicated to be submitted to a jury, and that it was, in fact, submitted to them with very careful and correct instructions as to its bearing on the case. The testimony of Norval Walsworth was: That, after the alleged renewal of the conflict by deceased and his relatives, he went into the house and found his father wounded and covered with blood, and his rifle lying on the bed; that at said time he supposed his mother was in the house; that he picked up his father's rifle and went out of the door believing his own life and his mother's to be in danger from deceased and his relatives, who, as he claimed, were firing at and into the house; that at the time he fired the fatal shot he believed his own life and his mother's to be in danger. There is nothing in the bill of exceptions that indicates any disposition on the part of Norval Walsworth to begin an affray with deceased and his relatives; but, on the contrary, as shown by the bill of exceptions, he was one of the parties who strove to allay Charles H. Walsworth's anger, or fear, by calling out to him that Carroll Mankin had no gun, but only a cane in his hand.

2. The charge of the court admirably stated the issues to the jury, and the general charge upon the law of self-defense, so far as it related to the right of Norval and Charles H. Walsworth to defend themselves, is a model charge; but the court entirely omitted to charge the jury upon the right of defendant, Norval Walsworth, to protect his mother from danger to her life from an alleged unjustifiable attack upon the house by deceased and his brother. If, as claimed by Norval Walsworth, his father had withdrawn from the conflict and made his submis-

sion, and after that the deceased followed up the conflict without any necessity, or apparent necessity, for so doing, and continued to shoot at or into the house where the mother of Norval was believed by him to have been at the time, he had a right to act upon appearances, and if he honestly believed that his mother was in the house, and the circumstances were such as would have led a reasonably prudent man to so believe, and at the same time the circumstances were such as induced in his mind a reasonable, honest belief that her life was in danger from a felonious and unnecessary attack by deceased upon the house, he had a right to shoot in her defense, and the refusal to so instruct the jury was error.

3. The request of the defendants for an instruction that evidence of threats against the Mankin family should not be considered as against Norval Walsworth, would have been good law if it had been confined simply to that proposition. There is no doubt that where the killing is indeliberate, and not in cool blood, previous threats made by one defendant are not evidence against a co-defendant who had no knowledge of them.

4. The requested instruction tendered by defendant went further than this, and asked the court to instruct the jury that if they were satisfied from the evidence of those who witnessed the affray, as to which party commenced it, they should not consider the evidence of threats as against either defendant. We do not understand that it is the province of the court to instruct a jury that, if one item of relevant evidence satisfies their mind upon a given point, another item of relevant evidence upon the same point should be rejected. The request was loaded down with a palpable error, and the court was not bound to give it.

Other instructions of the court are challenged in the defendants' brief; but the criticisms are, we think, merely verbal.

Taking the charge as a whole, we think the learned and venerable jurist who presided at the trial stated the

law clearly and correctly, except for the omission heretofore adverted to; but, for that error, which appears to be a substantial one, the cause must be reversed, and a new trial granted.

REVERSED.

Submitted on briefs August 10, decided August 17, 1909.

GENNES v. PETERSON.

[108 Pac. 515.]

MORTGAGES—FORECLOSURE—SCOPE OF RELIEF—ADVERSE CLAIMS.

The only proper object of a suit to foreclose a mortgage being to bar the mortgagor and those claiming under him, the court in such a suit had no jurisdiction to determine an alleged title paramount to that of the mortgagor, set up by certain of the defendants in an answer containing a prayer only that the suit be dismissed as to them.

From Crook: WILLIAM L. BRADSHAW, Judge.

State by MR. JUSTICE SLATER.

This is an ordinary suit by Ole Gennes and Nels Layon to foreclose a mortgage on the N. W. $\frac{1}{4}$ of section 8, in township 17 S., of range 11 E. of Willamette Meridian, executed by the defendants, August Peterson and Bertha Peterson, on January 8, 1907, in favor of plaintiffs to secure payment of the former's note amounting to \$2,000. J. N. Hunter and W. H. Staats were made defendants to the suit; the complaint as to them alleging that "each claim to have some interest in or claim upon the real estate described in the second paragraph of this complaint, which interest, or claim, if any, is wholly unfounded and in fact does not exist."

The Petersons made default; but Hunter and Staats answered admitting that each of them claimed an interest in the property, but denying that such claim was unfounded and does not exist, and as an affirmative defense they allege: That they are the owners in fee simple of the lands described in the complaint, by mesne conveyance from plaintiffs' alleged mortgagors, antedating plaintiffs' alleged mortgage, and duly recorded in the office of the county clerk of Crook County, long prior

to the execution of the plaintiffs' alleged mortgage; that, at the date of the execution of plaintiffs' mortgage, defendants' title to said lands was paramount to the title of plaintiffs' mortgagors; and that at that time the latter had no title whatever. They prayed for a dismissal of the suit as to them.

The reply denied the averments of the answer.

A trial was had, to which the defendants disclosed the source of their title to be through a sale of said property on January 19, 1905, on an execution issued out of the circuit court of Crook County upon a judgment obtained by the Theo. Hamm Brewing Company against August Peterson on January 29, 1904. Plaintiffs offered in evidence the patent from the United States to August Peterson issued on September 10, 1906, which recites that the patentee had deposited in the General Land Office a certificate of the register of the land office at The Dalles, Oregon, whereby it appears that he had made full payment for the land under the act of Congress of April 24, 1820. No other proof as to when Peterson made final proof and payment was offered. A decree was entered foreclosing the mortgage and adjudging: That at the time said judgment was rendered, execution issued, and the sale of the property occurred, Peterson had no attachable interest in the property; that the attachment, sale, and sheriff's deed thereunder are void; that Hunter and Staats acquired no title to said property; that the mortgage was a prior and existing lien thereon; and that they are barred and foreclosed of all rights, claims, or equity of redemption therein.

From this decree Hunter and Staats have appealed.

REVERSED.

Submitted on briefs under the proviso of Rule 16 of the Supreme Court. 50 Or. 580 (91 Pac. IX.).

For appellant there was a brief over the name of *Mr. M. R. Elliott*.

For respondent there was a brief over the names of *Messrs. Spooner & Twomey* and *Mr. M. E. Brink*.

MR. JUSTICE SLATER delivered the opinion of the court.

It is claimed in the appellants' brief that, at the time the land was attached in the original action against Peterson, he had made his final proof, paid the government price for the land in controversy, and had received the receiver's final receipt under the act of Congress known as the "timber and stone act" (Act June 3, 1878, c. 151, § 1; [20 Stat. 89: U. S. Comp. St. 1901, p. 1545]). and upon this assumption under the holding of this court in *Budd v. Gallier*, 50 Or. 42 (89 Pac. 638), it is maintained that Peterson had no attachable interest in the land. There is nothing in the record, however, to establish the facts upon which the argument is based; but, if there were, we have come to the conclusion that the court had no jurisdiction to try the question of an adverse legal title originating prior to the execution of the mortgage which is sought to be foreclosed. When defendants alleged in their answer that they claimed a legal title paramount to the title of Peterson at the time he executed the mortgage to plaintiffs, and asked that the suit be dismissed as to them, it was the duty of the court to grant their prayer. The only proper object of a suit to foreclose a mortgage is to bar the mortgagor and those claiming under him; and adverse claims, whether originating under a conveyance by a third party prior to the mortgage, or subsequent to it, or under a conveyance by the mortgagor made prior to the mortgage, are generally matters of purely legal jurisdiction, and do not come within the cognizance of a court of equity. *Corning v. Smith*, 6 N. Y. 82; *Emigrant Ind. Sav. Bank v. Goldman*, 75 N. Y. 127; *Ord v. Bartlett*, 83 Cal. 428 (23 Pac. 705); *Tinsley v. Atlantic Mines Co.*, 20 Colo. App: 61 (77 Pac. 12); 2 *Jones Mortgages*, (6 ed.) § 1445; *Wiltsie, Mortgage Foreclosure* (Kerr's Supp.) § 418.

At the close of section 1440 of 2 Jones, Mortgages, that author says:

"It has been claimed, however, that when one has been made a defendant in a foreclosure suit, and has set up by answer a paramount title, and without objections has gone to trial upon that issue, he cannot, if beaten, ask a reversal on the ground that the issue was not properly triable in that action; but the authorities do not sustain this view. All the title a mortgagee can obtain by foreclosure is the title of his mortgagor, and that is the only title that can be considered in the foreclosure suit."

We are of the opinion, however, that the question there suggested is not before us, because these defendants, while they alleged a paramount title, did not ask that it be adjudicated and determined, but that the suit be dismissed as to them. They offered sufficient evidence to show the origin of their claim of title, and that it antedated the giving of the mortgage. Whether it amounted to a title was not for the court to determine, but, for lack of power to adjudicate the matter, it was bound to dismiss the suit as to these defendants.

The decree will therefore be reversed so far as it affects them; but, as to the foreclosure of the mortgage, it is allowed to stand without prejudice to the rights of these defendants originating prior to the execution of the mortgage.

REVERSED.

Argued July 27, decided August 17, 1909.

STATE v. MILLER.

[108 Pac. 519.]

INDICTMENT AND INFORMATION—FORM.

1. An indictment, in general, must contain a specific description of the offense, and not merely the statement of a conclusion of law.

INDICTMENT AND INFORMATION—STATUTORY OFFENSE.

2. Where a statute creates and defines a new offense, it is sufficient for an indictment thereunder to state the offense in the language of the statute.

INDICTMENT AND INFORMATION—LANGUAGE OF STATUTE—"ITINERANT VENDER."

8. Laws 1905, p. 222, prohibiting any itinerant vender or hawker of any drug, nostrum, etc., for the treatment of any disease or injury, to offer the

same for sale without securing a license from the board of pharmacy, as amended by Laws 1907, p. 281, defining the term "itinerant vender" to include all persons who carry on the business described, by passing from house to house or by haranguing the people on public streets or in public places, or use the customary devices for attracting crowds, and therewith recommending their wares and offering them for sale. *Held*, that an information in the language of the statute charging that defendant, while being a traveling vender of a drug, offered to sell the same without securing a license, etc., was not demurrable as alleging a mere conclusion of law concerning defendant's occupation; defendant being required to take notice that it was intended to charge that he was an "itinerant vender" as defined in the amendment.

STATUTES—TITLE—PLURALITY OF SUBJECTS.

4. Section 3806, B. & O. Comp., provides for examination by the board of pharmacy of applicants to determine their right to registration as pharmacists, and Section 3812 regulates the sale of poisons; both sections being parts of Act February 21, 1891 (Laws 1891, p. 157), entitled an Act "to regulate the practice of pharmacy and the sale of poisons in the State of Oregon." *Held*, that Act February 21, 1905 (Laws 1905, p. 222), entitled "An Act to amend Sections 3806, 3812, of Bellinger and Cotton's Annotated Codes and Statutes of Oregon, and to provide for the licensing of itinerant vendors of all drugs, nostrums, ointments, and providing a penalty for violation thereof," did not violate Section 20, Article IV, Constitution of Oregon, requiring that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title.

CONSTITUTIONAL LAW—HAWKERS AND PEDDLERS—REGULATION—POLICE POWER—EQUALITY—CLASSIFICATION.

5. Laws 1905, p. 222, requiring itinerant vendors of drugs, etc., to procure a license from the board of pharmacy, as amended by Laws 1907, p. 281, and prescribing a penalty for the sale of drugs by an itinerant vender without such license, was a proper exercise of police power, and was not in violation of Section 20, Article I, Constitution of Oregon, declaring that no law shall grant any class special privileges or immunities, in that it did not apply equally to all citizens in the State, since it applied equally to all itinerant vendors of drugs which was proper basis of legislative classification.

CONSTITUTIONAL LAW—CLASS LEGISLATION—CLASSIFICATION.

6. The legislature, in passing laws regulating hawkers and peddlers, may divide them into different classes, provided the classification is reasonable and the regulatory provision applies equally to all engaged in the same class.

From Grant: GEORGE E. DAVIS, Judge.

Statement by MR. JUSTICE SLATER.

The defendant, J. H. Miller, was charged upon an information filed in the circuit court for Grant County with having violated section three of the act of February 21, 1905 (Laws 1905, p. 223), requiring any itinerant vender or hawker of any drug, nostrum, ointment, or application of any kind for the treatment of any disease or injury, to procure a license therefor from the Board of Pharmacy of this State before offering for sale any

such drug, etc. The defendant demurred to the information. This being overruled, he was tried and convicted of the charge, and has appealed from the judgment entered against him.

AFFIRMED.

For appellant there was a brief over the names of *Mr. James K. Weatherford* and *Mr. Erret Hicks*, with an oral argument by *Mr. Weatherford*.

For the State there was a brief with oral arguments by *Mr. Andrew M. Crawford*, Attorney General, and *Mr. John W. McCulloch*, District Attorney.

MR. JUSTICE SLATER delivered the opinion of the court.

1. The first objection raised by the demurrer to the sufficiency of the information is that it does not state the facts constituting an itinerant vender, or hawker, but pleads a conclusion of law. The allegation, so far as material, is that the defendant, "while being a traveling vender of a drug, * * did offer for sale and sell to Robert Stockdale, a drug, etc." It is contended that the phrase "while being a traveling vender" is a conclusion of law, and does not state a fact. The general rule of pleading is that the indictment must contain a specific description of the offense, and it is not enough to state a mere conclusion of law. Wharton, Crim. Pl. & Pr. § 154.

2. When, however, a statute creates and defines a new offense, on the principles of common-law pleading, it may be said that it is sufficient to frame the indictment in the words of the statute, in all cases where the statute so far individuates the offense that the accused has proper notice from the mere adoption of the statutory terms what the offense he is to be tried for really is. Wharton, Crim. Pl. & Pr. § 220.

3. By an amendatory act of February 25, 1907 (Laws 1907, p. 281), the meaning of the term "itinerant vender," as used in this act, is defined to include "all persons who carry on the business above described, by passing from

house to house, or by haranguing people on the public street or in public places, or use the customary devices for attracting crowds and therewith recommending their wares, and offering them for sale." By referring to the law on which the charge was brought, and of which the defendant is bound to take notice, he would be informed as to what facts constituted an "itinerant vender." The information, being in the language of the statute creating the offense, is sufficient. *State v. Carr*, 6 Or. 133; *State v. Packard*, 4 Or. 157; *State v. Ah Sam*, 14 Or. 347 (13 Pac. 303); *State v. Lee*, 17 Or. 488 (21 Pac. 455); *State v. Shaw*, 22 Or. 287 (29 Pac. 1028; *State v. Thompson*, 28 Or. 296 (42 Pac. 1002). See, also, *State v. Foster*, 21 R. I. 251 (43 Atl. 66); *State v. Duncan*, 9 Port. (Ala.) 260; *Sterne v. State*, 20 Ala. 43.

4. It is next urged that the act of February 21, 1905 (Laws 1905, p. 222), creating the crime charged, is void, because it contravenes in two particulars Section 20, Article IV, Constitution of Oregon, which requires that "every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title." The title of the act in question is as follows: "To amend Sections 3806 and 3812 of Bellingier and Cotton's Annotated Codes and Statutes of Oregon, and to provide for the licensing of itinerant venders of drugs, nostrums, ointments, and providing a penalty for violations thereof." It will be seen that the subject matter of that part of the act now in controversy is sufficiently stated in the title of the act, and it must be conceded that there is but one question to determine, viz: Does the act embrace more than one subject, or are there two subjects embraced therein which are not germane each to the other? Section 3806 of the Code pertains to examination by the Board of Pharmacy to determine the qualification of applicants for registration as pharmacists, and the issuance of certificates of registration, and Section 3812 to the regulation of the sale of poisons.

Both of these sections are parts of the act of February 21, 1891 (Laws 1891, p. 157), the title of which is: "To regulate the practice of pharmacy and the sale of poisons in the State of Oregon." In this country the business of a "pharmacist" and a "druggist" is one, and the person who prepares and compounds medicines also sells them, so that, in popular speech, the two are used interchangeably as practically synonymous, and it was with the regulation of pharmacy as an occupation, or business, in relation to the public, not only in compounding, but in selling drugs and medicines, that the act of 1891 dealt; and hence to regulate and prohibit the sale of drugs or medicines by others than druggists or pharmacists would be germane to the title and subject of the act. *State v. Donaldson*, 41 Minn. 74 (42 N. W. 781). The first section of the act of 1891 makes it unlawful for any person not a registered pharmacist to conduct any pharmacy, drug store, apothecary shop, or store for the purpose of retailing as well as compounding medicines or poisons. So, then, the independent title to the amendatory act of 1905, "to provide for the licensing of itinerant venders of drugs, nostrums, ointments, and providing a penalty for violations thereof," does not introduce a new or different subject of legislation, but is further legislation upon the same subject. The act therefore, in that respect, is not in contravention of that provision of the constitution.

5. It is also suggested in the brief of defendant's counsel, but not elucidated by argument, that such law violates Section 20, Article I, Constitution of Oregon, which provides that "no law shall be passed granting to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." The recent decision of this court in *State v. Wright*, 53 Or. 344 (100 Pac. 296) is cited, and solely relied upon by the defendant to sustain the suggestion made; but the present case clearly comes within the exception to

the general rules there announced. It was there held that the peddlers' act of 1905 (Laws 1905, p. 339), requiring a license to peddle stoves, ranges, wagons, etc., operates unequally in that it requires one peddling two or three harmless and useful articles to pay a fee for the privilege, and indirectly permits peddlers of other articles, not named therein, whether harmful or not, to do so without restriction or limitation, and is void because it is arbitrary and class legislation; but it was also held that the State may impose a tax or require a license from persons engaged in certain callings or trades, without being bound to include all persons or all property that may be legitimately taxed for governmental purposes, but the classification must be on some reasonable basis, and the law, when enacted, must apply alike to all engaged in the business or occupation. The court was unable to discover in that case any reasonable basis for the distinction undertaken to be drawn by the legislature between the right to peddle stoves, buggies, or fanning mills (which possessed no inherent danger to public health or morals, but were prohibited), and patent medicines, dynamite, and poisons (which are inherently dangerous, but the sale thereof impliedly permitted by peddlers); and hence it was termed an "arbitrary distinction." Mr. Justice BEAN, who delivered the opinion, was careful to state at the very threshold of the discussion of the question that it was important to note that the case he was considering did not involve the right of the State to regulate the sale of articles which are, or may be, injurious to the public health or morals.

6. It was expressly conceded that the legislature may in such laws divide peddlers into different classes; but it was held that the classification must be on some reasonable basis, and the law when enacted must apply alike to all engaged in the business or occupation. Reasonable regulation by law of the sale of drugs, medicines, and poisons by retailers has been uniformly upheld as a valid

exercise of police power. 14 Cyc. 1079. The object of such laws is the protection of public health, *Commonwealth v. Zacharias*, 181 Pa. 126 (37 Atl. 185); and statutes requiring itinerant venders of drugs, who publicly profess to cure disease thereby, to pay a license fee, have been upheld upon the same grounds. 14 Cyc. 1083; *State v. Gouss*, 85 Iowa, 21 (51 N. W. 1147). There is certainly a reasonable distinction to be made between the sale of stoves ranges, wagons, carriages, fanning mills, on the one hand, and drugs, nostrums, ointments and applications for the treatment of diseases and injuries. The former are harmless and have no hidden power liable to injure public health, while the composition of the latter is generally secret, and frequently contains deleterious elements unknown to the purchasers. The distinction arises from the inherent quality of the articles vended, and not from the character of the persons vending them.

We are of the opinion that the classification made by the law is reasonable, and within the power of the legislature to make. The law is of uniform operation. It applies alike to all such itinerant venders, and its privileges and immunities are open to all persons, upon the same terms. So far as it relates to the objections suggested and considered herein, we are of the opinion that the act is a valid exercise of legislative power.

The judgment is affirmed.

AFFIRMED.

Argued April 1, decided June 15, rehearing denied August 17, 1909.

ROGERS v. PORTLAND LUMBER CO.

[102 Pac. 601; 108 Pac. 514.]

MASTER AND SERVANT—INJURIES TO SERVANT—EMPLOYER'S LIABILITY ACT—PLEADING.

1. To entitle an injured employee to recover under Laws 1907, p. 302, requiring safeguarding of dangerous machinery in mills and factories, he must plead noncompliance by the master with the terms of the act; that the injury was the result of such noncompliance, and that plaintiff had given notice to the employer within six months, of the time, place, and cause of the injury.

MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE OF MASTER—QUESTION FOR JURY.

2. In an action for injuries to a servant by the sudden starting of machinery, evidence *held* to require submission of the question whether the injury was the result of defendant's negligence, to the jury.

MASTER AND SERVANT—INJURIES TO SERVANT—SAFEGUARDING GEARING—QUESTION FOR JURY.

3. Where a machine, by which plaintiff was injured while assisting to repair it, was liable to start automatically, whether it was a safe place for repairers without safeguarding the gearing, was for the jury.

MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

4. Where a servant was injured by the alleged automatic starting of a machine as he was assisting in repairing the same, and he had no notice that it was liable to start automatically, he was not negligent as a matter of law in failing to take a safe position, and the question of assumed risk and contributory negligence were for the jury.

MASTER AND SERVANT—INJURIES TO SERVANT—DANGEROUS MACHINERY—MASTER'S DUTY.

5. Where a servant was injured by the automatic starting of certain gearing, while he was repairing a chain connected therewith, and defendant's foreman knew that it was liable to so start, it was defendant's duty to take some precaution to prevent such result.

MASTER AND SERVANT—INJURIES TO SERVANT—KNOWLEDGE OF FOREMAN—DEFECTIVE MACHINERY—QUESTION FOR JURY.

6. Knowledge of defendant's foreman that certain machinery in its mill was liable to start automatically was the knowledge of defendant, and whether it was negligence for defendant to leave the gearing unguarded, was a question for the jury.

MASTER AND SERVANT—INJURIES TO SERVANT—CAUSE OF ACCIDENT.

7. Where a servant was injured by the sudden starting of machinery while he was repairing it, and it was shown that the machinery was liable to start automatically by the vibration of other machinery in motion, plaintiff's failure to allege or prove directly what caused the machinery to start was not fatal to a recovery.

From Multnomah: THOMAS O'DAY, Judge.

Statement by MR. JUSTICE EAKIN.

This is an action for personal injuries suffered by plaintiff, Joseph M. Rogers, on July 18, 1907, while employed in defendant's sawmill. Plaintiff was employed as an assistant to Van Loo, a millwright, and, at the time of the injury complained of, he was helping Van Loo, in the line of his duty, in repairing one of the chains used in transferring timber from the main carriage to the pony carriage, which conveys the timber to the saw. The cogwheel gearing in which plaintiff was injured and

the chain upon which the repairs were being made were situated immediately under the upper floor and about seven feet above the lower floor. The workmen, in making the repairs, stood upon a wooden horse placed on the lower floor. While thus engaged plaintiff's jumper caught in the gearing and pulled him into it, injuring his arm so that it was necessary to amputate it at the shoulder joint. The evidence is not very definite as to the gearing; but, as we understand it, the power is transmitted to the cogwheel gearing and shaft, which drives the chains, by a double friction driving gear. The friction gear consists of two friction wheels constantly revolving in opposite directions. A large disc or wheel, located between them, and which communicates the power to the cogwheel gearing, is put in motion by contact with one or the other of the friction wheels. It is controlled on the upper floor by a lever and is stopped by placing the disc at, what witnesses term, "dead center." The arm of the operating lever on the upper floor is detachable at the floor, leaving a short portion of it below the surface of the floor. The cogwheel gearing is within 12 or 18 inches of the chain. At the time of the accident the power had been shut off and the lever removed; but there is a conflict in the evidence as to whether the gearing had ceased moving, when plaintiff commenced to make the repairs, or was still revolving by its own momentum. Plaintiff charges negligence on part of defendant—(1) its failure to have a lock upon the lever which controlled the center friction wheel, and (2) failure to have the gearing covered—and alleges that the gearing was set in motion in some manner unknown to plaintiff.

The answer denies that there was any negligence on defendant's part, and alleges that plaintiff assumed the risk of injury from the unguarded gearing, that the injury was the result of the negligence of a fellow servant, and alleges contributory negligence, in that plaintiff voluntarily took an unsafe place to work when a safe

place was available to him, and that it was negligence for him to commence the repairs while the gearing was in motion.

At the close of plaintiff's evidence, defendant moved for a judgment of nonsuit, for the reason that plaintiff had failed to prove a cause sufficient to be submitted to the jury, which motion was denied. At the close of the case defendant asked the court to direct a verdict in its favor, which was denied. These two rulings are the errors relied on. Upon the trial a verdict was rendered for plaintiff. Defendant appeals. **AFFIRMED.**

For appellant there was a brief and an oral argument by *Mr. Ralph W. Wilbur.*

For respondent there was a brief and an oral argument by *Mr. Henry E. McGinn.*

MR. JUSTICE EAKIN delivered the opinion of the court.

1. Plaintiff, in his brief, relies on the provisions of the act of February 25, 1907 (Laws 1907, p. 302), providing for safeguarding dangerous machinery in mills and factories, as precluding the defense that plaintiff assumed the risk of unguarded machinery. To entitle an employee to recover for injuries, resulting from a violation of the provisions of that act, it is necessary to plead noncompliance by the employer with the terms of the act, and that the injury was the result of such noncompliance, and also plead a compliance by plaintiff with the conditions of recovery for resulting injury by giving notice, within six months, to the employer, of the time, place, and cause of the injury. There is no suggestion in the pleadings that the statute has been violated by defendant, or that plaintiff relies upon a violation thereof. Therefore the provisions of the act are not available to plaintiff in this action.

2. As to the cause of the injury, the evidence tends to show that, when the chain broke, Wallace, the operator,

set the lever at dead center, and afterwards notified plaintiff and Van Loo to repair the same. Moyer, the sawyer, says that after this "I sawed up the cant on my carriage, and turned around to load the next one, and I saw this 17 (57) foot cant lying on the rolls, and I ran for the lever and grabbed it, and just as I grabbed it Mr. Wallace came around and grabbed it"; but he thinks he did not move it off center. After plaintiff fell on the gearing, Van Loo went up stairs to throw the lever off; but "the lever was straight up and down," and he did not touch it. As indicated by the evidence, these are the only persons who were near the lever. We refer to this evidence to show its tendency to establish that the lever was not moved from the center by the act of any person. Plaintiff testified that the gearing was not moving when he started to fix the rivet in the chain, while Van Loo is equally as positive that it was still running by its own momentum. Van Loo says that plaintiff's being caught in the gearing was sufficient to, and did stop it, which further tends to show that the power was not on. Wheeler, who was a millwright employed in this mill in June, prior to this accident, was called as a witness by defendant, and testified: That, at one time, when he was helping Kidd, the foreman, to repair the chain, the disc was moving rapidly, and Kidd told him to see if there was any space between the disc and the friction wheel; that Kidd directed him to get a scantling and put a brake on it, which witness did, and stopped it, and when released it started again, and he had to hold it with the scantling until the repairs were completed. He states that the friction was not touching by three sixteenths of an inch, and, in explaining the cause of its starting, says:

"Well I think the cause of that was that the connection between the lever and the disc—that is, between the main lever and the lever that works the box back and forth, to throw the disc against first one friction and then the other—was loose."

Plaintiff says the gearing was not moving when he commenced the repairs, and that it started suddenly, causing the injury. The evidence tends to establish that the gearing was stationary when plaintiff commenced to repair the chain, and, at the time of the injury, it started automatically by reason of defects in the machine and the lever connections, of which defendant had notice, and was sufficient to be submitted to the jury, as to whether the injury was the result of the negligence of defendant.

3. If the machine was liable to start automatically, then, whether it was a safe place for the repairers to work without safeguarding the gearing, was a question for the jury. Although the gearing was located out of reach of the ordinary workmen, yet the millwrights had occasion to work about it a great deal. Van Loo says that Rogers helped him to repair that chain many times, and he speaks of it as a common occurrence. Wheeler testifies that he helped repair it, and plaintiff states that he helped repair it ten or twelve times, and that it broke very frequently. In *Geldard v. Marshall*, 43 Or. 438 (73 Pac. 330), one of the issues was practically the issue here—whether there was any evidence from which the jury could have found negligence on the part of defendant—in regard to which Mr. Justice BEAN says: "It is not necessary that there should be positive proof of negligence. It, like any other fact, may be inferred from the circumstances. There may be, and are, cases in which the master's negligence is clearly inferable, although there is no positive proof thereof. The rule is that if two inferences may be legitimately drawn from the facts in evidence, one favorable and the other unfavorable to the defendant, a question is presented which calls for the opinion of the jury. If, however, there is no proof of any fact by which the defendant's conduct may be ascertained, there is nothing for the jury. The mere proof of an accident therefore ordinarily raises no presumption of negligence; but, where it is accompanied by

proof of facts and circumstances from which an inference of negligence may or may not be drawn, the case cannot be determined by the court as a matter of law, but must be submitted to the jury. *Griffin v. Boston & Albany R. Co.*, 148 Mass. 143 (19 N. E. 166: 1 L. R. A. 698: 12 Am. St. Rep. 526); *Mooney v. Connecticut River Lum. Co.*, 154 Mass. 407 (28 N. E. 352); *Barnowsky v. Helson*, 89 Mich. 523 (50 N. W. 989: 15 L. R. A. 33); *Blanton v. Dold*, 109 Mo. 64 (18 S. W. 1149). Therefore it was a question for the jury whether the gearing was liable to start automatically, and should have been safeguarded.

4. As to the question of contributory negligence by the plaintiff, it is alleged in the complaint, stated in the answer, and the testimony shows, that it was customary and necessary to the safety of the workmen, when repairing the chain in question, to stop the gearing. Van Loo says:

"And when there is any repairing on that, they pull that lever off and throw it down, and the man operating that is supposed not to touch it unless we give him orders that it is all O. K. "

There is testimony tending to show that it had stopped when plaintiff approached it. If so, and he had no notice that it was liable to start automatically, then the questions whether he had a right to rely upon the machine remaining stationary, whether he assumed the risk, and whether it was negligence for him to work on the north side of it, although it might have been safer on the other side, when the machine was in motion, were for the jury. *Donahue v. Drown*, 154 Mass. 21 (27 N. E. 675); *Blanton v. Dold*, 109 Mo. 64 (18 S. W. 1149).

Both the questions of assumed risk and contributory negligence were proper questions to be submitted to the jury upon the evidence adduced, and we find no error in the denial of the motion for nonsuit or for a directed verdict.

AFFIRMED.

Decided August 17, 1909.

ON PETITION FOR REHEARING.

[108 Pac. 514.]

MR. JUSTICE EAKIN delivered the opinion of the court.

The basis for this motion is that the cause of the accident is not definitely shown by the evidence, and that therefore the liability of defendant is not established, and nonsuit should have been allowed.

5. The complaint alleges "that it was the duty of the defendant to have said gearing stationary during the time that plaintiff and those employed with him were engaged in repairing the chain, and this is conceded by all the witnesses. There was testimony tending to show that the gearing was stopped before the repairs were commenced. Plaintiff had a right to act on the assumption that it would not start while he was at work upon it, and the evidence indicates that it was not started by any fellow workman. If the machinery was of such character, or in such a condition, that it was liable to start automatically or by the vibration caused by other machinery in motion, and defendant had knowledge of that fact, then it was its duty to provide a lever lock, notwithstanding it was not usual to use a lock on such a lever; or, if not practicable to use a lock, then to use some other precautions to avoid such a result.

6. As stated in the opinion, there was evidence tending to show that defendant's foreman knew by his own experience a short time before that the gearing was liable to start automatically, and this was knowledge by the defendant, and the proof upon these questions brings the case within the allegations of the complaint, and was properly submitted to the jury. The evidence upon the question as to whether it was negligence on the part of the defendant to leave the gearing unguarded was also sufficient to take the case to the jury, regardless of what started the machinery. We have not based this

decision on the principle of *res ipsa loquitur*, but upon the proof tending to establish defendant's negligence.

7. It is not fatal to plaintiff's case that he does not allege or prove directly what caused the machinery to start. As said in *Geldard v. Marshall*, 43 Or. 438 (73 Pac. 330), cited in the opinion, if there are circumstances proved from which the jury can properly infer negligence, it is sufficient to be submitted to them. *Duntley v. Inman*, 42 Or. 334 (70 Pac. 529 : 59 L. R. A. 785), cited by defendant to the effect that the defendant has performed his duty when he has furnished such appliances as are ordinarily used for the purpose intended, is qualified by the condition that he keep them in proper condition. In that case it is said: "In some instances the circumstances attending the accident may be sufficient, if unexplained, to justify the jury in drawing an inference of negligence. In such cases, however, the physical facts themselves are evidential" and speak of the neglect.

The motion for rehearing is denied.

AFFIRMED: REHEARING DENIED.

Argued July 28, decided August 17, 1909.

STATE v. GERMAIN.

[108 Pac. 521.]

FALSE PRETENSES—ELEMENTS OF OFFENSE—PASSING OF TITLE.

1. In order to sustain a conviction of false pretenses, the prosecutor must have been induced to part with the title to the property of which he was defrauded; mere parting with possession being insufficient.

FALSE PRETENSES—ELEMENTS OF DEFENSE—PASSING WITH TITLE.

2. In a prosecution for obtaining money by false pretenses, consisting of directing prosecutor for \$7.50 to an alleged employer which did not exist, a recital in a receipt for the money that it was a "deposit made subject to securing position" "balance due thirty days from beginning work," and that it would be refunded in case the applicant should produce evidence that he had applied in person to the place where he was directed and failed to get the situation, did not indicate that defendant received the money as bailee and not as payment: his promise to refund indicating an intent not to return the identical money received, but to treat the money as payment for services, and not as a bailment.

FALSE PRETENSES—REPRESENTATIONS.

3. Defendant received \$7.50 from prosecutor, and executed to him a receipt for that sum, for which defendant agreed to furnish correct information by

which prosecutor should be enabled to secure a situation as lumberman with the "S. B. Lumbr. Co. at city." An indictment charged that, at the time the receipt was given, defendant stated to prosecutor that such lumber company was a large firm, partnership, business, or corporation, and that defendant knew such to be the case. *Held*, that defendant's representation that there was such a firm was a representation of an existing fact on which a prosecution for false pretenses could properly be based.

FALSE PRETENSES—VARIANCE—EVIDENCE.

4. Where an indictment for false pretenses charged that defendant received money, evidence showing that he received prosecutor's check on a bank, which defendant cashed before he was arrested, did not constitute a variance; the check being merely the vehicle by which defendant obtained the money.

FALSE PRETENSES—EVIDENCE—ORAL TESTIMONY—CORROBORATION.

5. Section 1812, B. & C. Comp., defining "false pretenses," does not require the pretense to be in writing; but Section 1407 declares that, on a trial for obtaining from any person any valuable thing by false pretenses, no evidence can be admitted of a false pretense expressed orally and unaccompanied by a false token or writing, but such pretense or some note or memorandum thereof must be in writing and either subscribed by or in the handwriting of the defendant. *Held*, that such section does not require that the memorandum contain the whole pretense, but that it should accompany and corroborate the oral evidence thereof, and hence, where the fraudulent representation was in writing, parol evidence of the conversation had between prosecutor and defendant at the time was admissible to corroborate the writing.

CRIMINAL LAW—PAROL EVIDENCE.

6. Where a receipt given for money pursuant to alleged fraudulent representations contained the letters "S. B. Lumbr. Co." to designate the name of a business concern to which prosecutor was referred for employment, parol evidence was admissible to explain the meaning of such letters and abbreviations.

CRIMINAL LAW—OTHER OFFENSES—MOTIVE—INTENT.

7. In a prosecution for false pretenses, testimony concerning similar offenses was admissible to show motive and fraudulent intent.

CRIMINAL LAW—EVIDENCE—REBUTTAL.

8. Where, in a prosecution for false pretenses, the State introduced evidence of other similar offenses to show motive and fraudulent intent, the court properly permitted defendant to explain the transactions proved by the State, but refused to allow defendant to prove additional instances not otherwise referred to, in which he had returned money received from employees for whom he had failed to procure employment.

From Multnomah: EARL C. BRONAUGH, Judge.

Statement by MR. JUSTICE MCBRIDE.

Defendant, B. F. Germain, was convicted by the verdict of a jury of the crime of obtaining money by false pretenses on an indictment, the caption, omitting title, and charging part of which is as follows:

"The said B. F. Germain on the 8th day of December, A. D. 1908, in the County of Multnomah and State of

Oregon, then and there doing business as Germain's High-Class Information Bureau Company, did then and there knowingly, falsely represent and pretend to one Henry M. Clinesmith, that he, the said B. F. Germain, then and there had a position with the Smith Brothers Lumber Company of the city of Portland, said county and State, to give out and fill, and that he, the said B. F. Germain, could procure for him, the said Henry M. Clinesmith, the said employment, and that a certain writing of the tenor following, to wit: 'Germain's High-class Information Bureau Co., B. F. Germain, President and Manager. None but first class employees registered and sent out. Phone A 2145. Office room 2-3 Benson building, Fifth and Morrison streets. Portland, Oregon, Dec. 8, 1908. Received from H. M. Clinesmith the sum of \$7.50, for which we agree to furnish correct information by which the above-named employee shall be enabled to secure a situation as lumberman with the S. B. Lumbr. Co. at city, wages \$150 per month; failing to do which, we promise to refund the above amount paid and the fare for transportation actually paid to and from the place where said applicant is sent by said agent on return of this receipt, together with the written statement from the employer or other evidence that the applicant has applied in person at the place to which he is directed herein, and to the person to whom he is directed herein or his agent, and could not get the situation. B. Germain, Employment Agent'—there being written on the top thereof and across the face thereof the following words and figures, to wit: 'Deposit made subject to securing position, \$7.50, balance due 30 days from beginning work. Dec. 15th'—then and there by him, the said B. F. Germain, signed in the manner and form aforesaid and delivered to and accepted by him, the said Henry M. Clinesmith, was a good and valid agreement whereby he, the said Henry M. Clinesmith, could then and there secure the said position, which he, the said B. F. Germain, then and there falsely represented and pretended to him, the said Henry M. Clinesmith, that he, the said B. F. Germain, then and there had to give out and fill as aforesaid, by means of which said false pretenses and representations aforesaid by him, the said B. F. Germain, then and there made to him, the said Henry M. Clinesmith, then and there believed and relied on, he, the said B. F. Germain, obtained

from the said Henry M. Clinesmith, and he, the said Henry M. Clinesmith, then and there delivered to, and he, the said B. F. Germain, received and accepted from the said Henry M. Clinesmith in consideration of and as a fee for procuring the situation aforesaid, the sum of \$7.50 in lawful money of the United States of America, and of the value of \$7.50, a more particular description of which being to the grand jury unknown, and of the personal property of the said Henry M. Clinesmith, with intent of him, the said B. F. Germain, then and there to cheat and defraud him, the said Henry M. Clinesmith, of the said sum of money; whereas in truth and in fact no such partnership, business, firm or corporation known as, existing or doing business as the Smith Brothers Lumber Company then and there existed at the said city, county and State, and the said Smith Brothers Lumber Company was then and there a fictitious concern, and the said B. F. Germain did not then and there have to give out or fill the said position of employment as aforesaid, and the said writing was not a good nor valid agreement, whereby the said Henry M. Clinesmith, could then and there secure the said situation, and this, the said B. F. Germain, then and there well knew, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon."

Defendant was sentenced to imprisonment in the penitentiary for a term of two years, and appeals.

AFFIRMED.

For appellant there was a brief and oral arguments by *Mr. George A. Johnson* and *Mr. John A. Jeffrey*.

For the State there was a brief over the names of *Mr. Andrew M. Crawford*, Attorney General, *Mr. George J. Cameron*, District Attorney, *Mr. Thad W. Vreeland* and *Mr. J. K. Page*, Deputy District Attorneys, with an oral argument by *Mr. Vreeland*.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

1. The first objection is to the sufficiency of the indictment. It is contended that the receipt shows on its face that the prosecutor, Clinesmith, did not part with the

title to his money, but only with the possession of it, and that, as the crime of obtaining money under false pretenses is committed only when the injured party is induced to part with the title to his property, the indictment does not state facts sufficient to constitute a crime. The courts have held with practical unanimity that the crime for which the defendant was convicted is not committed unless the party defrauded is induced by the false pretense to part with the title to his property, and that the mere parting with the possession is not sufficient. *State v. Anderson*, 47 Iowa, 142; *Grunson v. State*, 89 Ind. 533 (46 Am. Rep. 178); *Miller v. Commonwealth*, 78 Ky. 15 (39 Am. Rep. 194); *People v. Rae*, 66 Cal. 423 (6 Pac. 1: 56 Am. Rep. 102). In these and in many other cases the courts hold that when by means of fraud, trick, or artifice, the possession of property is obtained with felonious intent, and the title still remains in the owner, the crime is larceny; but if the title, as well as the possession, is parted with, the offense is that of obtaining money under false pretenses. The distinction is a very fine and technical one, and does not seem to be very substantial, but is very tenaciously adhered to by the courts.

2. It is contended in this case that, as the receipt shows on its face that the money was to be refunded if Cline-smith failed to get the situation applied for, and because the words "deposit made subject to securing position, \$7.50, balance due 30 days from beginning work," were written across the face of the instrument, Clinesmith retained the property in the money; the defendant being a mere bailee. We cannot agree with this view. The receipt contains a promise to refund the amount paid and the fare actually paid to and from the place where said applicant should be sent to work, in case applicant should produce evidence that he had applied in person to the place where he was directed and failed to get the situation. To "refund" means to repay, to pay back,

and we are of the opinion that the title passed upon the payment of the money to defendant, and that there is nothing in the instrument itself that indicates that defendant was to return the identical money received. When defendant accepted the money, he accepted, not as a bailee, but as a payment, as the words in the receipt "we promise to refund the above amount paid," clearly indicate. *Rackliff v. Greenbush*, 93 Me. 99 (44 Atl. 375).

3. It is also contended that neither the indictment nor the proof shows the existence of a false representation as to present existing fact, which is always a necessary ingredient of the crime of which defendant is charged. The copy of the receipt or contract set forth in the indictment contains this statement:

"Received from H. M. Clinesmith the sum of \$7.50, for which we agree to furnish correct information by which the above named employee shall be enabled to secure a situation as lumberman with the S. B. Lumber Co. at city."

The indictment alleges, and the proof shows, that when this receipt was given the defendant stated to Clinesmith that the Smith Brothers Lumber Company was a large firm doing business in the city, when in truth and in fact there was no such firm, partnership, business, or corporation, and that defendant knew this to be the case. Here was a representation as to an existing fact, namely, that there was such a firm as that indicated by defendant. The indictment is sufficient.

4. It was claimed on the argument that there was a variance between the indictment and the proof, as the evidence showed that Clinesmith gave defendant his check on a Portland bank, while the indictment alleges that the defendant received money. The evidence also shows that defendant cashed the check before he was arrested. The check was the mere vehicle by which defendant was enabled to obtain Clinesmith's money, and there was no variance.

5. It was also claimed that there was error in permitting oral evidence of the conversation between defendant and Clinesmith at the time the money was paid to defendant; the defendant maintaining that no evidence could be given of the transaction except the receipt itself. We do not so understand the law. In England, and in many of the states, neither the false pretense nor the evidence of it is required to be in writing; in fact, statutes requiring either of these requisites are the exception, rather than the rule. However, in this State, as a precaution against perjury, the legislature has required the evidence of such false pretense to be accompanied by a writing or some false token. Section 1812, B. & C. Comp., which defines the offense, does not require the false pretense to be in writing, so that, if this section stood alone, no written evidence of the pretense would be required; but section 1407, B. & C. Comp., has so modified the rules of evidence that evidence of a false pretense must be accompanied by a false token or writing. Said section reads as follows:

"Upon a trial for having, by any false pretense, obtained the signature of any person to any written instrument, or obtained from any person any valuable thing, no evidence can be admitted of a false pretense expressed orally and unaccompanied by a false token or writing, but such pretense or some note or memorandum thereof, must be in writing and either subscribed by or in the handwriting of the defendant."

This is a matter of procedure and evidence, and not of pleading. In *State v. Renick*, 33 Or. 584 (56 Pac. 275; 44 L. R. A. 266; 72 Am. St. Rep. 758), the view above taken was enunciated by this court in the following language: "The statute has also made it an offense for any person to obtain, or attempt to obtain, with intent to defraud, any money or property whatever by any false pretense or by any privy or false token. (Citing

Section 1812, B. & C. Comp.) The evidentiary matter necessary to support the charge must consist of a false token or writing accompanying the pretense. (Citing Section 1407, B. & C. Comp.)" While the precise question involved in the contention at bar was not involved in that case, it is cited as indicating the view of the court that the pretense itself need not necessarily be in writing, but that some note or memorandum thereof in writing was necessarily a part of the evidence that must be introduced in order to sustain a conviction. The statute of Indiana on the subject is as follows: "Whoever with intent to defraud another designedly by color of any false token or writing obtains from any person anything of value," etc., It will be seen that this statute differs from ours, in requiring the pretense to be in writing, and yet in construing this section the court says: "The appellant's counsel says in argument: 'I claim that to make a case under the present statute it must be by color of a false token or writing alone, unaided by any verbal false pretense or representation; that the false token or writing must be of such a character that a person of ordinary caution would give it credit without relying upon any verbal representation whatever.' We do not think that the words 'by color of any false token or writing,' as used in the statute, should receive any such rigid or literal interpretation." *Wagoner v. State*, 90 Ind. 504, 507.

6. We think that the law excluding oral evidence of a false pretense, unless accompanied by some note or memorandum thereof in writing, was passed out of abundant caution to preserve the liberty of the citizen, and to require corroboration of oral testimony by some memorandum in the handwriting of the person accused. In this respect we think the rule analogous to that prescribed in this State in regard to the testimony of an accomplice, and that it is not necessary that the memorandum should contain the whole pretense, but that it

should accompany and corroborate the oral evidence of the pretense. On this theory the evidence of the conversation between defendant and Clinesmith was admissible. The evidence of Clinesmith, showing the intention of the parties in using the letters "S. B. Lumbr. Co.," was not only admissible on the ground above stated, but also for the reason that, where abbreviations are used in a writing, oral evidence is admissible to show their meaning. 1 Am. & Eng. Enc. (2 ed.) p. 99; *La Vie v. Tooze*, 43 Or. 590 (74 Pac. 210).

7. Testimony concerning similar offenses was properly received as tending to show motive and fraudulent intent. *State v. Briggs*, 74 Kan. 377 (86 Pac. 447); *State v. O'Donnell*, 36 Or. 222 (61 Pac. 892). In the case of *State v. Briggs*, *supra*, will be found a copious citation of the authorities sustaining the doctrine herein announced.

8. The defendant offered evidence to show that he had returned money in many cases where parties paying it had failed to get employment; but the evidence was rejected. We think the ruling of the court was proper. The mere fact that he had dealt with other persons without defrauding them was not evidence that he had dealt honestly with the prosecuting witness. The court ruled that he could go into and explain the transactions introduced in evidence by the State, and this was as far as he had any right to introduce testimony as to his dealings with other persons.

We find no substantial error, and the judgment will be affirmed.

AFFIRMED.

Argued on motion to dismiss March 9, decided April 18, 1909; argued on the merits August 8, decided August 17, 1909.

STATE v. MARTIN.

[100 Pac. 1106; 108 Pac. 512.]

CRIMINAL LAW—REVIEW—RECORD—ADMISSION OF EVIDENCE.

1. In the absence of a bill of exceptions, alleged error in the admission of evidence is unavailing on review.

CRIMINAL LAW—APPEAL—OBJECTIONS TO INDICTMENT—WAIVER.

2. Under Section 1365, B. & C. Comp., providing "that the objection to the jurisdiction of the court over the subject-matter of the indictment, or that the facts stated do not constitute a crime, may be taken in the trial under a plea of not guilty, or in arrest of judgment," the objection that the facts stated in an indictment do not constitute a crime may be raised first in the appellate court, and is not waived by failing to demur or move in arrest of judgment in the trial court.

CRIMINAL LAW—REVIEW—ASSIGNMENT OF ERRORS.

3. The error relied on in the review of a criminal prosecution should be clearly assigned, so that the district attorney has notice thereof.

CRIMINAL LAW—REVIEW—ASSIGNMENT OF ERRORS.

4. The objections that the facts stated in an indictment do not constitute a crime, or that the trial court does not have jurisdiction of the offense, may be raised in the appellate court, though not assigned as errors.

CRIMINAL LAW—APPEAL—REVIEW—SCOPE—BILL OF EXCEPTIONS.

5. Where, on appeal from a conviction, there is no bill of exceptions, the sufficiency of the information is the only subject for review.

INDICTMENT AND INFORMATION—INFORMATION—FORM.

6. An information for murder, charging that defendant on May 1, 1903, in M. County, did then and there unlawfully, feloniously, purposely, and of his, the said defendant's, deliberate and premeditated malice, kill and murder, one W., by then and there unlawfully, feloniously, purposely, and of his, the said defendant's, deliberate and premeditated malice, striking, hitting, and beating him, the said W., with a sharp instrument, a more particular description of which is to the district attorney unknown, contrary to the statutes made and provided, and against the peace and dignity of the State, was in substantial compliance with the form prescribed by Section 1304, B. & C. Comp., and form 1 of the appendix, and sufficient.

INDICTMENT AND INFORMATION—OFFENSE INCLUDED IN CHARGE.

7. Where an indictment for murder in the first degree was sufficient to charge manslaughter, of which accused was convicted, its failure to sufficiently charge murder in the first degree was not material.

From Multnomah: JOHN B. CLELAND, Judge.

Decided April 18, 1909.

ON MOTION TO DISMISS.

[100 Pac. 1106.]

Opinion by MR. CHIEF JUSTICE MOORE.

1. This is a motion to dismiss an appeal. The errors relied upon in the brief of defendant's counsel, to secure the reversal of a judgment of conviction in a criminal action, relate to the admission of evidence; but as the transcript contains no bill of exceptions, and none appears to have been settled or allowed by the trial court, the alleged errors are unavailing. *State v. Kline*, 50 Or. 426 (93 Pac. 237.)

2. The defendant's counsel now requests permission to challenge the sufficiency of the indictment, which, it is asserted, appears from an examination of a copy of the judgment roll to be inadequate. The district attorney resists the application, contending that, where errors declared to have been committed in the trial of a cause are based upon evidence not contained in the bill of exceptions, the judgment ought to be affirmed, citing in support of that principle the cases of *Fisher v. Kelly*, 26 Or. 249 (38 Pac. 67), and *Miles v. Swanson*, 47 Or. 213 (82 Pac. 954), which were civil actions. In criminal causes the statute prescribes the several grounds of demurrer to an indictment (Section 1357, B. & C. Comp.), and provides that when the defects so enumerated appear on the face of the pleading they can be taken advantage of only by demurrer, "except that the objection to the jurisdiction of the court over the subject-matter of the indictment, or that the facts so stated do not constitute a crime, may be taken at the trial, under a plea of not guilty and in arrest of judgment." Section 1365, B. & C. Comp. In construing such exception in *State v. Mack*, 20 Or. 234 (25 Pac. 639), and in commenting upon the sufficiency of an indictment, Mr. Chief Justice STRAHAN says: "But here the error is in the judgment roll, in the indictment itself, in that it fails to charge a crime. Such an error is not waived by silence or cured by judgment." A headnote to that case is as follows: "The objection that the facts stated in an indictment do not constitute a crime may be taken for the first time in the appellate court, and is not waived by failing to demur or move in arrest of judgment in the trial court." The language last quoted may seem broader than the opinion warranted; but we believe it to have been a correct statement of the law, and adopt the expression as applicable to the case at bar.

3. The errors relied upon to secure the reversal of a judgment in a criminal action ought to be clearly assigned

by the appellant, so that the district attorney would have notice thereof and be prepared to controvert the principles involved.

4. Where, however, it is insisted in this court, for the first time, that the facts stated in the indictment do not constitute a crime, or that the trial court did not have jurisdiction of the subject-matter of the offense charged, such objections can be urged, though not assigned.

The motion should be denied; and it is so ordered.

MOTION DENIED.

Decided August 17, 1909.

ON THE MERITS.

[108 Pac. 512.]

The defendant, Edward Hugh Martin, was convicted of the crime of manslaughter, and from the judgment and sentence following, he appeals.

For appellant there was a brief over the names of *Mr. John A. Jeffrey*, *Mr. Seneca Fouts*, *Mr. Clinton A. Ambrose* and *Mr. Charles E. Lenon*. with an oral argument by *Mr. Jeffrey*.

For the State there was a brief over the names of *Mr. Andrew M. Crawford*, Attorney General, *Mr. George J. Cameron*, District Attorney, *Mr. John J. Fitzgerald*, and *Mr. J. H. Page*, Deputy District Attorneys, with an oral argument by *Mr. Page*.

MR. JUSTICE SLATER delivered the opinion of the court.

5. The defendant was, by information, charged with the crime of murder in the first degree, and upon trial was convicted of manslaughter. The charging part of the information is as follows:

"The said Edward Hugh Martin, on the 1st day of May, A. D. 1908, in the County of Multnomah and State of Oregon, then and there being, did then and there unlawfully, feloniously, purposely, and of his, the said Edward Hugh Martin's, deliberate and premeditated

malice, kill and murder one Nathan Wolff, by then and there unlawfully, feloniously, purposely, and of his, the said Edward Hugh Martin's, deliberate and premeditated malice, striking, hitting, and beating him, the said Nathan Wolff, with a sharp instrument, a more particular description of which is to the district attorney unknown, contrary to the statutes made and provided, and against the peace and dignity of the State of Oregon.

From the judgment entered against him, the defendant has appealed; but, having failed to procure and file a bill of exceptions, the only subject of inquiry is the sufficiency of the information.

6. It is urged in his behalf that there is no crime charged because there is a failure to allege: (1) Both an intent to assault and an intent to kill; (2) malice aforethought in words which will bear no other reasonable construction, both as to the wounding and the killing; and (3) the time of the death of the person assaulted. In support of these several propositions, it is claimed that that part of the information preceding the word "by" is not of the charging part, and states only a conclusion of law. The following cases are some of those particularly urged upon our attention as holding in accord with counsel's contention: *Fouts v. State*, 8 Ohio St. 98; *Kain v. State*, 8 Ohio St. 307; *Schaffer v. State*, 22 Neb. 557 (35 N. W. 384; 3 Am. St. Rep. 274); *State v. Linhoff*, 121 Iowa, 632 (97 N. W. 77); *People v. Cox*, 9 Cal. 32. The indictments there considered were attempted to be drawn in form as at common law. For instance, in *Fouts v. State*, 8 Ohio St. 98, which seems to be a leading case, the indictment was intended to charge murder. First there is alleged in legal terms, with words descriptive of the intent and premeditated malice, a felonious assault with a certain weapon inflicting a particular mortal wound, describing it, which resulted in death at the instant or at a subsequent time. Because the indictment did not contain, in the description of the crime, a direct and specific averment of a purpose or intent to inflict a

mortal wound, or to kill, it was held insufficient; but, to avoid the involved and technical circumlocution of the common law, our statute has modified and simplified the form of charging such crimes by permitting the direct averment of the intent, malice aforethought, and the result of the assault combined in these words: That the accused at a specified time and place, purposely and of his premeditated malice, killed C. D. by shooting him with a gun or pistol, etc. In charging the crime in the information under consideration, some amplification of the form has been indulged in, but not, we think, to its material detriment. It is a sufficient answer to say that the language employed is substantially the same as that authorized by the Code, which has been repeatedly sanctioned by this court. *State v. Dodson*, 4 Or. 64; *State v. Brown*, 7 Or. 186; *State v. Wright* 19 Or. 258 (24 Pac. 229); *State v. Childers*, 32 Or. 119 (49 Pac. 801). Section 1304, B. & C. Comp. gives a general form of indictment, and in the section next following provides that: "The manner of stating the act constituting the crime, as set forth in the appendix to this Code, is sufficient in all cases where the forms there given are applicable, and in other cases forms may be used as nearly similar as the nature of the case will permit." Form No. 1 of the appendix provides a form for the charging part of an indictment for murder in the first degree, which is substantially that used in this instance.

7. It might be said that the consideration of the first two points urged is not necessary to a decision of the case, for they are concerned only with the charge of murder in the first degree, while the information is clearly sufficient to charge manslaughter, of which the defendant was convicted.

Finding the information sufficient to support the judgment, it is therefore affirmed.

AFFIRMED.

Submitted on briefs August 5, decided August 24, 1909.

STATE v. MOXLEY.

[108 Pac. 655.]

CRIMINAL LAW—LARCENY—ACCOMPLICES.

1. In view of the statute by its terms making larceny and the receiving of stolen goods distinct offenses, where defendant had nothing to do with the unlawful taking of a horse, his subsequent purchase of the animal did not make him an accomplice, even if he had knowledge of the previous theft.

LARCENY—SUFFICIENCY OF EVIDENCE.

2. Evidence held sufficient to justify a conviction of general larceny of a horse, and not of a larceny by altering a brand.

From Wallowa: JOHN W. KNOWLES, Judge.

Statement by MR. JUSTICE MCBRIDE.

Defendant, J. A. Moxley, was indicted jointly with one J. H. Howard by the grand jury of Wallowa County, for the crime of larceny of a gelding, and upon the trial was convicted and sentenced in imprisonment in the penitentiary, from which judgment he appeals.

On the trial Iven Stevens testified: That he had been employed for about two years by Samuel Wade, president of the Wallowa Stock Protective Association, to detect and bring to punishment persons engaged in stealing stock. That he went to defendant's place about June 20, 1908, and went to work for him building fence. That about June 21st he had a talk with defendant, in which it was agreed that defendant, Howard, and himself should engage in stealing horses off the range, and run them over into the State of Washington. That in pursuance of that agreement he and Howard did run seven head over into Washington about July 20th, and traded them off; witness receiving as his share of the proceeds a hack and set of harness, which he subsequently traded to defendant for the horse in controversy. Witness claimed that in driving the horses into Washington, and in his associations with Moxley and Howard, he was acting solely for the purpose of detecting and bringing to punishment the persons guilty of horse stealing. The State put the president of the stock association on the stand to show the

nature of Stevens' employment; but, upon the objection of the defendant, the evidence was excluded. Stevens also testified: That when he went to Moxley's place the horse in controversy was already there in defendant's pasture; that the brand had been altered before he saw it; that defendant told him that the horse belonged to Jim McAllister; and that he and Howard had changed the brand from a figure "6" to a double "B," and advised him when he traded for the animal to make the brand a little plainer. He took the horse from Moxley's pasture to that of Jack Johnson, and told Johnson that it was a "crooked" horse, meaning a stolen animal, and asked Johnson to particularly notice the brand.

Subsequently defendant and Howard were arrested for the theft of the horse, and Howard pleaded guilty and was used as a witness against defendant on the trial. Howard testified: That late in May, 1908, he and the defendant were riding on the range where this horse was running, and defendant said that he wanted it; that about June 1st he stole the horse and took it to defendant's ranch; that later he and defendant altered the brand on it; that the horse was stolen before they had any understanding with Stevens about running horses over into Washington; and that Stevens never had anything to do with taking this horse. The evidence showed that the horse in controversy was not among the number that were taken over into Washington, but remained at defendant's until Stevens traded for it and took it away. There was no testimony as to the taking, except that of Stevens and Howard. The evidence showed that McAllister was the actual owner of the animal. The court, among other things, instructed the jury that Howard, under his own testimony, was an accomplice, and that they could not convict the defendant upon his uncorroborated testimony. Defendant's counsel requested the court to charge the jury that witness Stevens was also an accomplice, which request was refused. Counsel also

requested the court to charge the jury that, if they found from the testimony that Stevens was an accomplice, they could not convict defendant upon his testimony unless it was corroborated, which the court also refused to do, and the refusal to give these two instructions is assigned as error.

AFFIRMED.

Submitted on brief under the proviso of Rule 16 of the Supreme Court. 50 Or. 580 (91 Pac. XII).

For appellant there was a brief over the names of *Messrs. Burleigh & Boyd*.

For the State there was a brief over the names of *Mr. Andrew M. Crawford*, Attorney General and *Mr. Francis S. Ivanhoe*, District Attorney.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

1. The only witnesses as to Stevens' connection with regard to the horse in controversy, are Stevens himself and Howard. Both of these witnesses agree that the horse had been taken from the range and turned into Moxley's pasture before any arrangement or talk was had with Stevens about gathering up the herd that was subsequently taken to Washington. There was no testimony that Stevens had anything to do with the taking of the horse in question, and, this being the case, his subsequent purchase of the animal would not make him an accomplice, even if he had knowledge of the previous theft. Blackstone, Book 4, p. 38; *Harris v. State*, 75 Tenn. 124; *Springer v. State*, 102 Ga. 447 (30 S. E. 971). Blackstone states the rule as follows:

"An accessory after the fact may be where a person, knowing a felony to have been committed, receives, relieves, comforts or assists the felon. * * To buy or receive stolen goods, knowing them to be stolen, falls under none of these description. It was therefore at common law a mere misdemeanor, and made not the receiver accessory to the theft, because he received the goods only, and not the felon."

In the case at bar the larceny was complete, according to all the testimony, before Stevens had anything to do with the animal. The defendant had selected it upon the range and suggested to Howard to steal it, and he and Howard together had rebranded it and turned it into defendant's pasture before any conversation was had with Stevens regarding a plan to steal other horses. There is no evidence to indicate that Stevens took this horse for any other purpose than to detect and punish the men who stole it; but, if the fact were otherwise, he would have been guilty of the substantive crime of receiving stolen goods, and not of larceny. We are aware that there are respectable authorities that hold that a receiver of stolen goods is an accessory after the fact of the principal felon, and therefore an accomplice; but we think that logic and the better authority sustain the opposite view, especially in a State like ours, where the statute by its terms has made larceny and the receiving of stolen goods distinct and substantive offenses.

2. It is also contended that the evidence shows that defendant's only participation in the offense was by altering the brand, and that he cannot be convicted of general larceny, but should have been tried for larceny by altering a brand. The recent possession of the stolen property, the manner in which he kept it and dealt with it, his statements to Stevens, that McAllister was the owner of it, his dealing with it as his own—all tend to show him to have been a principal in the theft, and to corroborate Howard's testimony that he alone profited by it.

The judgment of the lower court is affirmed.

AFFIRMED.

Argued March 8, decided June 22, rehearing denied August 24, 1909.

MORSE v. WHITCOMB.

[102 Pac. 788; 108 Pac. 775.]

EVIDENCE—EVIDENCE FOUNDED ON HEARSAY—REPUTE AS TO FACTS—OWNERSHIP.

1. In a suit to enjoin the closing of an alleged street which plaintiffs claim defendants represented, upon selling lots to them, would remain open as a

street, evidence that the strip was known by the public in general as T street, and appeared upon the city and telephone directories, and was called out by the street car conductor, by that name, and that mail was addressed to residents in that vicinity as on that street, was admissible in connection with numerous other circumstances tending to show that the strip was reserved for a street to show how it was generally treated by the public in that vicinity, Section 788, subd. 12, B. & C. Comp., making it a disputable presumption that one is the owner of property from common reputation of his ownership.

EVIDENCE—HEARSAY—REPUTE AS TO FACTS—OWNERSHIP.

8. In a suit to enjoin the closing of an alleged street which plaintiffs claimed that defendants represented, upon selling lots to them, would remain open as a street, evidence held to show that plaintiffs purchased the land with the understanding that the tract would be open as a street.

DEDICATION—EVIDENCE—SUFFICIENCY.

8. In a suit to enjoin the closing of an alleged street which plaintiffs claimed that defendants represented, upon selling lots to them, would remain open as a street, evidence held to show that plaintiffs purchased the land with the understanding that the tract would be open as a street.

DEDICATION—EVIDENCE—ADMISSIBILITY.

4. In an action to restrain the closing of a tract which plaintiffs claim defendants represented, upon selling lots to them, would be open as a street, a map showing various streets platted in lots of uniform size, with a number of smaller lots along the strip which plaintiffs claim was intended to be reserved as a street, was admissible to corroborate plaintiffs' testimony as to defendants' statement that that tract would be opened as a street.

ESTOPPEL—ESTOPPEL TO DENY DEDICATION.

5. Where defendants sold a number of lots, and represented to the purchasers that a tract adjacent thereto would be opened as a street, receiving an increased price for the lots because of their proximity to the proposed streets, defendants were estopped to deny that the strip was dedicated as a public street.

PRINCIPAL AND AGENT—RATIFICATION—RATIFICATION IN PART.

6. Where defendants' agent sold lots for them, receiving an increased price because of representations that an adjacent tract would be opened as a street, defendants, having received the proceeds of the sale, cannot assert that their agent exceeded his authority in making such representations.

EVIDENCE—PAROL EVIDENCE—ESTOPPEL.

7. While ordinarily purchasers of lots shown on plats thereof cannot claim more than is shown by the plat, where plaintiffs purchased lots upon representations that an adjacent tract which was shown on the plats as fractional lots would be opened as a street, they could show such representations by parol by way of estoppel; such evidence not being admitted to vary the plat.

APPEAL AND ERROR—REVIEW—TRIAL DE NOVO—EQUITY SUITS.

8. Equity suits are tried *de novo* on appeal.

HIGHWAYS—EXISTENCE—EVIDENCE.

9. The existence of a street or highway may be proved by showing a parol dedication accompanied by the user thereof by the public.

DEDICATION—EVIDENCE—ADMISSIBILITY.

10. A parol dedication accompanied by user may be shown by the acts of the owner such as selling lots on opposite sides of a strip suitable for a street and acquiescing in its use by the public for a long period of time.

DEDICATION—PUBLIC STREET—EVIDENCE—ESTOPPEL.

11. Evidence examined and held sufficient to establish the fact that defendants dedicated, as a public street, the strip of land in controversy, and should be enjoined from in any manner obstructing it.

HIGHWAYS—EASEMENTS—OBSTRUCTIONS.

12. Where a party seeks to restrain an obstruction of a highway or easement, the injured party is not limited or confined to that part of the roadway or easement abutting upon or in front of his premises.

From Multnomah: MELVIN C. GEORGE, Judge.

For appellants there was a brief over the names of *Mr. William P. Lord* and *Mr. Allen R. Joy*, with an oral argument by *Mr. Joy*.

For respondents there was a brief with oral arguments by *Mr. Jarvis V. Beach* and *Mr. David Goodsell*.

MR. JUSTICE KING delivered the opinion of the court.

This is a suit brought by *Amelia E. Morse*, *John Walton*, *William T. Moir*, and *George Stehnken* against *F. E. Whitcomb*, *David Goodsell*, and *T. S. McDaniel* to restrain them from obstructing, by building or otherwise, an alleged street, or roadway, 24½ feet in width, running east and west along the south line, and a part of blocks 11 to 20, inclusive, in that portion of the city of Portland known as "East Portland Heights." The trial court, after hearing the evidence and making an examination of the premises, made findings of fact to the effect that there had never been a dedication of the land to public use; that it had never been occupied by plaintiffs, or their grantors, or any of them, or by the public, or by any person, as a public way, except such use by plaintiffs for such purposes, by permission of the defendants, without any claim or right thereto; that none of the lots abutting upon the disputed strip of land were sold or transferred to any person with any guarantee, promise or claim that such strip would ever be a public way or street; that defendants are not estopped by reason of any sale, representations, or acts on their part, or their grantors, from questioning plaintiffs' rights therein, resulting in a dismissal of the suit, and this appeal therefrom.

The salient facts are: The blocks mentioned were formerly owned by H. D. McGuire and defendant Goodsell. The defendant, McDaniel, purchased an interest therein about the year 1904, and the other defendants acquired their interests since the purchase by plaintiffs. Prior to the year 1891 East Portland Heights was platted by McGuire and Goodsell, the then owners thereof, into lots, blocks, streets, alleys, etc., the fractional lots on the south of each of the blocks being $24\frac{1}{2}$ feet in width and numbered 8 and 9 in each block. Between each of the blocks running north and south, streets appear numbered 26 to 36, inclusive, which streets extend across the $24\frac{1}{2}$ -foot strip in question, to and abutting the Waverley addition, on the south, along the north line of which no provision for a street appear to have been made. Morse purchased lots 6 and 7, in block 19, abutting upon the strip in controversy from McGuire and Goodsell in 1891, and he and his wife testify that McGuire showed them the property, and, on being informed by them that they wanted a southeast corner lot, McGuire pointed out to them lots 6 and 7, stating they were corner lots; that the $24\frac{1}{2}$ -foot strip was reserved for a street, making one half of the street, the balance of which was to fall upon the adjacent property, and that, in any event, they would have an outlet to the extent of the strip thus reserved. The other plaintiffs testify to having purchased the property with a similar understanding, the information concerning which was given them by agents of the owner from whom they purchased. J. M. Smith testifies that he has resided in the locality of this tract of land since 1890; that he had an understanding with McGuire concerning the sale of lots on commission; that he found a customer whom he introduced to McGuire; and that they together looked over the property, the customer stating that he wanted corner lots, and finally made the purchase, in reference to which the witness, in substance, states: Mrs. Du Bois wanted corner lots; wanted two

lots, and first selected a corner lot with an inside lot on another tract which he had in charge to sell, and, when she found that she could not get a west frontage, he discovered he was in danger of losing her for a customer and solicited the privilege of turning her over to Mr. McGuire, to which she consented; that McGuire showed them the plat, and they inquired particularly about these fractional lots, and they said they were not for sale, but were reserved for a street; and that later she purchased on the corner where Thirty-first street intercepts what is called "Taggart Street," facing the west, and immediately erected a building thereon, which sale, he testified occurred in 1891, and for which he received the commission agreed upon between him and McGuire. It further appears that McGuire instructed Smith that the corner lots were sold according to the "lay of the land," and that lots 10 and 11, in block 16, abutting upon the 24½-foot strip were sold to Mrs. Du Bois, who paid a higher price than the lots north of them were listed for, and that, when Smith asked McGuire for the privilege of selling the fractional lots constituting the strip in question, McGuire assured him they were not for sale, but were reserved "for a purpose" and, when the witness asked "for what purpose," responded, "purpose of a street."

A number of other witnesses were called who testified that McGuire gave them permission to sell lots in that addition on commission, and it is clearly disclosed by the testimony that all of the plaintiffs purchased under representations in effect as above given, either from McGuire or from his agents, and others, not parties to the suit, testify to having purchased corner lots under a similar understanding.

1. It is evident from the testimony that the lots along this strip of land were purchased as corner lots, and that the purchasers thereof fully believed they were bordering upon a strip of land which either had been, or would be, reserved for a street; and that the lands along this alleged

street sold for a higher figure than those further north is not questioned. It is also clear that there was no material difference in the "lay of the land," but that the difference in the price paid ran from \$50 to \$100 per lot. Although the strip of land in question is not in the usual sense in which the term is used, a public highway, it is obvious that since about the year 1891 it has constituted the principal thoroughfare for the owners of property adjacent thereto; that delivery wagons came that way; that plaintiffs hauled their wood and other supplies over it; and that, while there were other possible ways of egress and ingress, they depended upon no other route for that purpose. It is true that there were other streets through which egress and ingress could have been made, but that this was the principal and most convenient thoroughfare, and the one principally relied upon by the owners of property in the vicinity, is sufficiently established. It is also shown that it was known and recognized by the public in general as "Taggart street," and, except during one or two years appeared upon the telephone and city directories under that name, was called out as such by street car conductors, and the mail going to residents in that vicinity was usually addressed to them as being on Taggart street. The admissibility of this class of testimony was objected to, and it is disclosed by the record that the trial court did not deem it material; but, while we think such testimony, standing alone, would not be sufficient to establish a dedication and would not be admissible for the purpose of proving ownership of the property, it is proper, along with numerous other circumstances surrounding the controversy, for the purpose of showing how the disputed tract was treated by the public, to which extent it tended to sustain the claim that this strip of land was intended to be reserved for the purpose for which it, during these many years, was used and treated by the owners thereof and public in general, coming, therefore, within that class of testi-

mony deemed admissible under Section 788, subd. 12, B. & C. Comp. To the same effect: *Wilson v. Maddock*, 5 Or. 480, 481; *Bartel v. Lope*, 6 Or. 321, 327; *Raymond v. Flavel*, 27 Or. 219, 248 (40 Pac. 158); *Meyers v. Dillon*, 39 Or. 581 (65 Pac. 867; 66 Pac. 814); *Eastern Oregon Land Co., v. Cole*, 35 C. C. A. 100 (92 Fed. 949).

2. As stated in *Wilson v. Maddock*: "It has been long held that common or general reputation may be received concerning a matter in which the public have an interest, or which directly concerns and affects the mass of the people of a town or locality. * *" The testimony alluded to certainly tends to show how the disputed tract was generally treated by the people in that vicinity, and it may be considered for that purpose.

3. Defendant Goodsell denies that he at any time personally stated that this strip was intended to be a street, but we think it established by a clear preponderance of the evidence that it was, in fact, so intended, and that the plaintiffs and others purchased under the theory and belief that it was thus intended, to say nothing of the feature that the grantors permitted the property to be sold as corner lots and received higher prices by reason thereof.

4. We are not unmindful of the rule announced and applied in the case of *Hogue v. City of Albina*, 20 Or. 182, 187 (25 Pac. 386, 388; 10 L. R. A. 673) to the effect: "A dedication is not presumed, but must be shown by the acts and declarations of the owner of such a public and deliberate character as clearly to show an intention on his part to surrender his land for the use of the public, and the burden of proof for which is on the party asserting such dedication * * and, unless such intention is clearly proved by the facts and circumstances of the particular case, no dedication exists." This is not a case where it is sought to establish a dedication by reference to the map or plat further than that the circumstances disclosed by the map, showing the various

street with blocks platted into lots of uniform size, with lots of much smaller dimensions along the strip, where it is claimed the street was intended to be reserved, are circumstances tending to corroborate the testimony of plaintiffs with reference to declarations of McGuire, and such plat was only offered and only entitled to be considered for that purpose, to which extent, at least, it is analogous to the case of *Warden v. Blakely*, 32 Wis. 690, where the court held that from an inspection of a plat which gave the block, with nothing to indicate that there was any street along the disputed line, it was "perfectly clear upon the face of the plat itself, offered in evidence, that Alice street extends along the south side of block 20, and consequently that the *locus in quo* is a part of one of the public streets of the village of Darlington. * * The subdivision of lots in block 20 shows that it was the intention of the original proprietor that Alice street should extend south of that block." The court further observed: "But it is objected on the other side that, if this was the intention of the proprietor, he would have designated Alice street by a line south of block 20, as was done in reference to other streets upon the plat. But the circumstance that there is no line there defining the boundary of the street can have no such controlling effect as the counsel for the plaintiffs is disposed to give it. * * Indeed, upon an examination of the plat itself, it seems impossible to arrive at any other conclusion than that it was the intention of the original proprietor to have Alice street extend across Main street and along the south side of block 20."

5. Defendants insist that by reason of his death, which occurred in 1898, they are deprived of McGuire's testimony, but we cannot presume that his testimony would have been more favorable to defendants than to plaintiffs. In fact, plaintiffs are equally entitled to insist that they are also deprived of valuable testimony by reason of the accident causing his untimely demise. Statements of the

witnesses relative to McGuire's representations at the time of the sales made by him, which were apparently under his control and management at the time plaintiffs became the purchasers, are consistent with subsequent events, as well as with the conceded facts that the lands purchased by plaintiffs are adjacent to the alleged street, and that no sales were attempted, or even permitted, of any of the fractional lots for more than ten years after plaintiffs purchased, and not until long after McGuire's demise, nor until after the realty in that vicinity had largely enhanced in value. It would certainly be inequitable to permit defendants to receive the enhanced value of the lots sold plaintiffs by reason of their proximity to what was represented to them as an intended street, and at the same time to retain the strip of land, which largely served the purpose of bringing about the sale. In other words, to do so would be to say that on the strength of this strip becoming a street much money has been received, and after the receipt thereof the street shall be closed, and at the same time the money acquired on its account retained.

6. Nor will it do, even if true, and the testimony strongly tends to establish otherwise, to say that the agents who sold to plaintiffs were, in making their representations with reference to the corner lots, etc., exceeding their authority. The case in these particulars, especially so far as the equities involved are concerned, is analogous to *McLeod v. Despain*, 49 Or. 536, 563 (90 Pac. 492; 92 Pac. 1088; 124 Am. St. Rep. 1066), in which we held that the principal must adopt or reject the act of his agent as an entirety, and cannot receive the benefit of such agency without bearing its burdens. To the same effect, see *Dillard v. Olalla Mining Co.*, 52 Or. 126 (96 Pac. 678), where the Oregon authorities are collated on the subject.

7. The strong contention of defendants, and, as appears from the record, the position of the learned court

below, appears to be that since the plat, with reference to which the property was purchased, discloses these fractional lots, plaintiffs are precluded from offering any evidence in support of their claim that the fractional lots were intended as a street. While this is the general rule (*Oliver v. Klamath Lake Navigation Co.*, 54 Or. 95 [102 Pac. 786]), it is not without exception. Here plaintiffs have pleaded an estoppel. The attempt is not to question the plat, or to show that there were no fractional lots there, as disclosed therein, but that, while such fractional lots appeared upon the plat and were there at the time of the purchase and the execution of the conveyances, they were to be deemed a street and public highway, and as such appurtenant to the property purchased. For instance, assume that the plat disclosed there was a ditch leading from some spring in the vicinity to and upon the premises, and, even though the deeds should not specifically mention such ditch and spring as being appurtenant to such lands, it would not, under the decisions in this State, be seriously questioned but that plaintiffs would be entitled to show by parol that such ditch was one of the appurtenances to the property purchased, and that the title thereto passed with it, regardless of whether specified in the deed or not. *Wimer v. Simmons*, 27 Or. 1 (39 Pac. 6; 50 Am. St. Rep. 685); *Turner v. Cole*, 31 Or. 154 (49 Pac. 971).

8. It must also be remembered that in this State, equity suits are tried *de novo*, while in most of the states from which the authorities are cited by defendants on the facts, the findings of the trial court are for all practical purposes treated as would be the verdict of the jury, and, where there is a conflict in the testimony, are not disturbed. Such, for example, is the case of *City of Los Angeles v. Kysor*, 125 Cal. 463 (58 Pac. 90). If such were the rule in this State, we would not feel justified in disturbing the findings of the learned court below, unless it would be on the ground that the record of the

testimony taken, accompanied by the remarks of the court as to its views of the law, clearly indicates that it was acting upon the theory that the map offered in evidence was conclusive, and that, under it, the testimony adduced by plaintiff was not legally entitled to consideration.

9. However, we think there can be no question as to plaintiffs' rights in this respect, for as stated in substance in *Gwynn v. Homan*, 15 Ind. 201, 202, the fact of a street or highway may be proved by showing a parol dedication to the public, accompanied by the user thereof, and such facts may be established by proof of acts on the part of the owner, such as selling lots on opposite sides of a strip of ground suitable for a street or highway, and standing by and seeing it used by the public as such, or by permitting such user, or owner, for a long period of time to use it under such circumstances as may tend to evidence a dedication.

10. Again, it does not seem credible that streets would be provided for at equal distances north of the strip of land in question, and that at this particular point no street was intended; and the fact that these fractional lots were left at the especial place where the street should be, to say nothing of the enhanced value of the adjoining lots, is a strong circumstance tending to establish that it was intended that this strip should be left for that purpose, and was so left by the owners thereof under the theory that the owners of Waverley addition would grant a like strip making a street about the usual width between the additions. It was then but natural that McGuire should make the representations attributed to him, and that the agents selling the property should say to the purchasers that they could safely buy with that understanding and act thereon.

11. After taking into consideration all of the conceded facts, together with other circumstances testified to, we think defendants should be and are estopped to question that the strip of land in controversy was intended, and

accordingly dedicated, as a public street, and that defendants should, therefore, be enjoined from in any manner obstructing it.

It follows that the decree of the court below must be reversed and one entered here in conformity with these views; and it is so ordered. REVERSED.

Decided August 24, 1909.

ON PETITION FOR REHEARING.

[108 Pac. 775.]

MR. JUSTICE KING delivered the opinion of the court.

12. It is insisted in appellants' petition for a rehearing that our conclusion, as heretofore announced, is in conflict with the principles enunciated in *Van Buskirk v. Bond*, 52 Or. 234 (96 Pac. 1105), in which it is held that a suit will not lie at the instance of private parties. In that opinion it is clearly stated that a denial of a right to a private party to restrain the obstruction of a highway is limited to cases where it does not appear that he has sustained some damage or injury differing in kind from that suffered by the general public, and that, even where there is evidence establishing such special injury, it must be clearly established or "free from doubt." The words quoted were not intended in a literal sense, or that no possibility of a doubt should exist, but merely that, after an examination of all the testimony, if the court could not, with reasonable certainty, satisfy itself as to the conclusion to be deduced from the testimony, the cause should be remanded for trial at law. After a careful examination of the testimony presented, we deemed it clear therefrom that plaintiffs incurred such special injury by reason of the obstructions complained of as to take the case out of the exceptions noted in *Van Buskirk v. Bond*, thereby entitling them to maintain the suit in their behalf. We have again scrutinized the record to ascertain the accuracy of our conclusion upon this

point, and find no reason to change our view. Nor are plaintiffs limited to the part of the roadway or easement in front of their lots. As held, the easement is appurtenant to their premises, is 24½ feet in width, running east and west, and extends along the south line, and a part of blocks 11 to 20, inclusive,

Concerning the question of notice on the part of McDaniel and others, we do not deem it important to inquire whether they had actual notice of the right to use the strip of land in controversy for the purpose claimed; for the record clearly discloses sufficient facts to have put them on inquiry, from which notice must be implied. The details bearing on this feature were sufficiently considered, making a further elucidation of the subject at this time unnecessary.

The rehearing is denied.

REVERSED: REHEARING DENIED.

Argued August 4, decided August 24, 1909.

STRAW v. HARRIS.

[108 Pac. 777.]

CONSTITUTIONAL LAW—STATE CONSTITUTIONS—AS LIMITATION OF POWERS.

1. The legislative department of a state, unlike that department of the national government, may enact any law not expressly or impliedly prohibited by the constitution.

CONSTITUTIONAL LAW—STATUTES—CONSTRUCTION.

2. All reasonable doubts must be resolved in favor of an act in determining whether it conflicts with the constitution.

STATUTES—SUBJECTS AND TITLES OF ACTS—CONSTITUTIONAL REQUIREMENTS—EXPRESSION IN TITLE OF SUBJECT OF ACT—"PORT."

8. Act February 12, 1909, is entitled "An act to provide for incorporation under general law of ports in counties bordering on bays or rivers navigable from the sea." Laws 1909, p. 78. Held that, in view of legislation and decisions on the subject, the term "port" has a recognized status, and is used in its larger acceptation as comprising under one name a district of many places classed together for the purpose of revenue; and hence the title of the act is sufficient under Section 20, Article IV, Constitution of Oregon, providing that the subject of every act shall be expressed in its title.

STATUTES—SPECIAL LAWS—CREATION OF CORPORATIONS—MUNICIPALITIES—"CORPORATION."

4. Section 2, Article XI, Constitution of Oregon, which, as first adopted, provided that corporations may be formed under general laws, but shall not be created by special laws except for municipal purposes, was amended June

4, 1906, to read: "Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws." *Held*, that such section, viewed in the light of the reference to "other corporations" in Section 9, providing that no county, city, town, or other municipal corporation shall become a stockholder in any corporation, etc., employed the word "corporation" in its broadest sense, including public, municipal, and private corporations; and hence a corporation for municipal purposes may not be created by special laws.

STATUTES—"GENERAL LAW"—"SPECIAL LAW."

5. A "general law" within the meaning of Section 2, Article XI, Constitution of Oregon, as amended June 4, 1906, and providing that corporations may be formed under general laws, but shall not be created by special laws, is one by which all persons or localities complying with its provisions may be entitled to exercise powers, rights, and privileges conferred, while a "special law" is one conferring on certain individuals or citizens of a certain locality rights and powers or liabilities not granted to or imposed on others similarly situated.

STATUTES—GENERAL AND SPECIAL LAWS.

6. Act February 12, 1909 (Laws 1909, p. 78), providing for the incorporation under general law of ports in counties bordering on bays or rivers navigable from the sea, is a general law within the provisions of Section 2, Article XI, Constitution of Oregon, as amended June 4, 1906, providing that corporations may be formed under general laws.

STATUTES—SPECIAL LEGISLATION—CREATION OF CORPORATIONS—CONFERRING POWER ON COURTS.

7. Under Section 2, Article XI, Constitution of Oregon, as amended June 4, 1906, and providing that corporations may be formed under general laws, the legislature had power in passing act February 12, 1909 (Laws 1909, p. 78), providing for the incorporation under general law of ports in counties bordering on bays or rivers navigable from the sea, to delegate to the county court the power to declare the incorporation of a port.

MUNICIPAL CORPORATIONS—INDEBTEDNESS—CONSTITUTIONAL LIMITATIONS—RESTRICTIONS IN INCORPORATION ACTS.

8. Section 5, Article XI, Constitution of Oregon, provides that acts incorporating towns and cities shall restrict their powers of contracting debts. Section 10 provides that no county shall create any debts exceeding the sum of \$5,000. *Held*, that neither of said sections is violated by act February 12, 1909 (Laws 1909, p. 78), providing for the incorporation under general law of ports in counties on bays or rivers navigable from the sea, because of no specific limitation of indebtedness being placed on municipalities to be created under it; such municipalities being neither towns or cities or counties.

CONSTITUTIONAL LAW—DISTRIBUTION OF GOVERNMENTAL POWERS—POWER OF COURTS—WISDOM OF LEGISLATION.

9. The courts may not say whether or not legislation is wise, reasonable, unjust, or oppressive; that function being for the legislative department only.

MUNICIPAL CORPORATIONS—INDEBTEDNESS—CONSTITUTIONAL LIMITATIONS.

10. Section 5, Article XI, Constitution of Oregon, provides that acts incorporating towns and cities shall restrict their powers of taxation, contracting debts, etc. Section 10 provides that no county shall create any debts or liabilities exceeding a certain sum. *Held* that, since the right given by the Constitution to form larger municipalities necessarily carries with it power

to include those more limited in territory regardless of the proportionate increase in the indebtedness and taxation to follow that may necessarily accrue to the included towns by reason thereof, the limitation placed on the corporations enumerated applies only to each standing as a separate and distinct political division, and not to a larger municipality of which they may form an integral part; and hence act February 12, 1909 (Laws 1909, p. 78), providing for the incorporation under general laws of ports in counties bordering on bays or rivers navigable from the sea, is not unconstitutional as imposing on incorporated towns within the limits of a port indebtedness and taxes exceeding the limitations prescribed in such sections.

MUNICIPAL CORPORATIONS—AMENDMENT OF CHARTERS.

11. Since act February 12, 1909 (Laws 1909, p. 78), providing for the incorporation under general law of ports in counties bordering on bays or rivers navigable from the sea, does not, by permitting the incorporation of ports, thereby directly attempt to amend the charter of any city or town within the boundaries thereof, but may only affect the charters and ordinances of such cities and towns to the extent that they may conflict with the general object for which the port may be organized, the act does not contravene Section 2, Article XI, Constitution of Oregon, as amended June 4, 1909, providing that the legislative assembly shall not enact, amend, or repeal any charter or act of incorporation of any municipality, city, or town, and giving the legal voters of every city or town power to enact and amend their municipal charter.

CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWERS.

12. The State may not surrender its sovereignty to municipalities to the extent that it must be deemed to have perpetually lost control of them.

MUNICIPAL CORPORATIONS—AMENDMENT OF CHARTERS.

13. Municipalities are but mere departments or agencies of the State, charged with the performance of duties for and on its behalf and subject always to its control, and it may therefore, regardless of any declarations in its constitution to the contrary, at any time revise, amend, or even repeal any of the charters within it, subject to vested rights and limitations otherwise provided by fundamental laws.

From Coos: JOHN S. COKE, Judge.

Statement by MR. JUSTICE KING.

This is a suit by E. E. Straw against W. C. Harris, J. C. Gray, E. Mingus, W. P. Evans and Henry Sengstacken, constituting the Board of Commissioners of the Port of Coos Bay, and involves the constitutionality of the incorporation of the "port of Coos Bay," a municipality organized under an act of the legislative assembly adopted February 12, 1909, entitled an "Act to provide for incorporation under general law of ports in counties bordering upon bays or rivers navigable from the sea, and to provide for the manner of incorporating such ports, and defining the powers of ports so incorporated an declaring an emergency." Laws 1909, p. 78. The

district is bounded on the west by the Pacific Ocean, and is situated in Coos County, embracing only a part thereof. It has for its object and purpose the general improvement, in the interest of navigation, of a number of navigable bays, ports, and inlets from the sea situated therein. There is more than one drainage basin in the district, but the limits of the incorporated territory do not extend beyond the natural watershed of any drainage basin of navigable water. Other facts necessary to an understanding of the legal points involved will appear in the opinion. The complaint fully states the facts, showing all the steps taken in forming the port involved, from which it appears that the organization was perfected in full conformity with the provisions of the general law mentioned, thereby bringing in question the constitutionality of the act. The proceeding seeks to enjoin the board of commissioners from condemning certain lands and from issuing bonds, or otherwise carrying into effect the general purpose for which the port was organized. From an order sustaining a general demurrer to the complaint, and decree thereon, plaintiff presents this appeal.

AFFIRMED.

For appellant there was a brief over the names of *Messrs. Guerry & Hollister*, with an oral argument by *Mr. James H. Guerry*.

For respondents there was a brief and an oral argument by *Mr. Cassius R. Peck*.

MR. JUSTICE KING delivered the opinion of the court.

1. The first point demanding attention questions the sufficiency of the title of the act under which the district was created, with reference to which it is insisted that the title does not conform to the requirements of Section 20, Article IV, Constitution of Oregon, in that it is insufficient in clearly expressing the purpose of the law. In this connection it is contended that there is no such legal term as the word "port," that it has no legal entity,

and that, since a different meaning from that which it has heretofore borne has not been legislatively declared, the subject-matter of the act is not included in the title, and accordingly not germane thereto. In considering this point, and other constitutional questions presented, we must keep in mind that it is a universally accepted rule of construction, that in the enactment of laws, the legislative department of a state, unlike that department of the national government, may enact any law not expressly or impliedly prohibited by the constitution.

2. In determining whether an act is in conflict or inconsistent therewith all reasonable doubts upon the question must be resolved in favor of the law thus assailed. We know of no authorities holding to the contrary, and among the adjudications in this State recognizing and adhering to this rule are: *Cline v. Greenwood*, 10 Or. 230; *Cook v. Port of Portland*, 20 Or. 580 (27 Pac. 263: 13 L. R. A. 533); *Umatilla Irrigation Co., v. Barnhart*, 22 Or. 389 (30 Pac. 37); *Simon v. Northrup*, 27 Or. 487 (40 Pac. 560: 30 L. R. A. 171); *Kaddery v. Portland*, 44 Or. 118, 143 (74 Pac. 710: 75 Pac. 222); *State v. Walton*, 53 Or. 557 (99 Pac. 431).

3. Bearing in mind that all uncertainties must be resolved in its favor, is the title of the act adequate? The section under which the title is attacked provides that:

"Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title." Section 20, Article IV, Constitution of Oregon.

A "port" in its strict and limited sense is defined in the *Americana* thus: "An artificial or natural harbor or haven; a sheltered inlet, cove, bay, or recess, into which vessels can enter and in which they can lie in safety from storm." It will be observed, however, that

following the word "ports" the title in part indicates the purpose for which ports under it may be incorporated by limiting them to "counties bordering upon bays or rivers navigable from the sea," and by stating that its purpose is to provide the manner of incorporation thereof, "defining the powers of ports so incorporated," etc. In *Dock Co. v. Brown*, (Eng.) 2 Barn. & Adol. 28, a similar question was presented, concerning which Lord Chief Justice TENTERDEN, after noting that "the question is whether the words 'port of Kingston-upon-Hull' are to be understood in the sense of locality, as denoting the particular place so named, or in a more enlarged and extensive sense, as comprising all the places and the whole district that, for some purposes of control, management, or superintendence are within the limits of, and dependent upon or members of, a port whereof Kingston-upon-Hull is the head and chief," holds that the word "port" is used in two senses: (1) Denoting a particular place; and (2) in a larger acceptation as comprising under one name a district of many places classed together for the purpose of revenue. Thus it appears that the word "port" has long been recognized as having a double meaning. The larger acceptation thereof, judging from enactments on the subject, together with adjudications thereon, it would seem is the sense in which it is usually understood in this State when used in legislation of the character under consideration. *Laws 1891*, p. 791; *Cook v. Port of Portland*, 20 Or. 580 (27 Pac. 263; 13 L. R. A. 533); *Farrell v. Port of Columbia*, 50 Or. 171 (91 Pac. 546; 93 Pac. 254); *Farrell v. Port of Portland*, 52 Or. 582 (98 Pac. 145); *The George W. Elder* (D. C.), 159 Fed. 1005. In the light, therefore, of the legislation and decisions upon the subject, we are of the opinion that the term "port" as here used must be deemed to have a recognized and established status, which, taken together with the reference in the title to "bays and rivers navigable from the sea," etc., leaves no room for doubt as to

what was intended by the title. The title of the act is sufficient.

4. The next question demanding attention is whether the port of Coos Bay, being a municipal corporation, comes within the purview of Section 2, Article XI, Constitution of Oregon. As first adopted, this section, so far as applicable to the subject under consideration, reads: "Corporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes." This provision was amended June 4, 1906, to read as follows: "Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws. * *" It is apparent from the language used in the section as first in force, when viewed in the light of the reference to "other municipal corporations" in section 9 of the same article that the word "corporation" was employed in its broadest sense, including therein public, municipal, and private corporations, and permitting the formation of municipal corporations by either general or special laws. It denoted such bodies as had formerly been created under that name by charter or special legislative act, and embraced both public and private corporations. *Murphy v. Board*, 57 N. J. Law, 245 (31 Atl. 229). And there is nothing in the amendement to indicate that its application was to be restricted. The same meaning accompanied the word into the amendment, in which the only limitation manifested goes to the power of the legislature respecting the subject, as to which the power to form corporations under special laws is denied.

5. In this connection, however, it is urged, with much emphasis, that the authorization of the creation of municipal corporations, as intended by the act of 1909 relating to the incorporation of ports, etc., is only another or indirect way of creating them, and has the same effect as a special law, thereby coming within the inhibition intended by the amendment. By the adoption of the

initiative and referendum into our constitution, the legislative department of the State is divided into two separate and distinct lawmaking bodies. There remains, however, as formerly, but one legislative department of the State. It operates, it is true, differently than before—one method by the enactment of laws directly, through that source of all legislative power, the people; and the other, as formerly, by their representatives—but the change thus wrought neither gives to nor takes from the legislative assembly the power to enact or repeal any law, except in such manner and to such extent as may therein be expressly stated. Nor do we understand that it was ever intended that it should do so. The powers thus reserved to the people merely took from the legislature the exclusive right to enact laws, at the same time leaving it a co-ordinate legislative body with them. This dual system of making and unmaking laws has become the settled policy of the State, and so recognized by decisions upon the subject. *Kadderly v. Portland*, 44 Or. 118 (74 Pac. 710; 75 Pac. 222); *Oregon v. Pac. Sta. T. & T. Co.*, 53 Or. 162 (99 Pac. 427).

6. Subject to the exceptions enumerated in the constitution as amended, either branch of the legislative department, whether the people, or their representatives, may enact any law, and may even repeal any act passed by the other. One of these exceptions relates to the invoking of the referendum and the other to the provision in the amendment quoted, which takes from the legislature the right to create corporations by special laws; otherwise there is no distinction. The statement that corporations shall not, by the legislature, be created by special laws necessarily implies that no limitation is intended to be placed upon the power of the legislative departments of the State, whether asserted by the people through the initiative, or by them through their representatives, to permit the formation of corporations by general laws upon the subject. A general law, within the meaning of

this section, is one by which all persons or localities complying with its provisions may be entitled to exercise powers, rights and privileges conferred. A special law, on the other hand, is one conferring upon certain individuals or citizens of a certain locality, rights and powers or liabilities not granted or imposed upon others similarly situated; and, measured by this rule, the law under consideration is general. *Farrell v. Port of Columbia*, 50 Or. 169 (91 Pac. 546: 93 Pac. 254).

7. The next inquiry relates to the right of the legislative department to delegate to the county court the power to declare the incorporation of the port, etc. The authority granted to provide for the general incorporation laws under consideration, necessarily implies the right to provide for a method of determining, through some of the agencies of the State, when the port has been fully organized. A method analogous to this is provided for bringing into effect a local option law when a vote is taken thereon in any certain locality, and this system of procedure has been upheld by this court. *State ex rel v. Richardson*, 48 Or. 309 (85 Pac. 225: 8 L. R. A. [N. S.] 362). That appellant's position on this point is untenable, see *Cook v. Port of Portland*, 20 Or. 580, 588 (27 Pac. 263: 13 L. R. A. 533); *Klamath Falls v. Sachs*, 35 Or. 325 (57 Pac. 329: 76 Am. St. Rep. 501); *Dallas v. Hallock*, 44 Or. 246, 253 (75 Pac. 204). Among the authorities from other jurisdictions holding that powers thus delegated are ministerial, as distinguished from judicial, are *Owners of Lands v. People*, 113 Ill. 296; *Elder v. Incorporators of Central City*, 40 W. Va. 222 (21 S. E. 738); *Farm Inv. Co. v. Carpenter*, 9 Wyo. 110 (61 Pac. 258: 50 L. R. A. 747: 87 Am. St. Rep. 918); *Crawford v. Hathaway*, 67 Neb. 325, 367 (93 N. W. 781: 60 L. R. A. 889: 108 Am. St. Rep. 647); *Speer v. Stephenson* (Idaho) 102 Pac. 365.

8. It is next maintained that the act is void because of no specific limitation of indebtedness being placed

upon the municipalities to be created under it. The constitution on the subject (Article XI, § 5) is as follows: 'Acts of legislative assembly incorporating towns and cities shall restrict their powers of taxation, borrowing money, contracting debts, and loaning their credit.' Section 10 of the same article provides: "No county shall create any debts or liabilities which shall singly or in the aggregate exceed the sum of five thousand dollars. * * " That the corporation under consideration does not come within the word "county" as used in section 10, above quoted, is manifest, and it has been heretofore held by this court that it is not included in the words "towns and cities" (*Farrel v. Port of Portland*, 52 Or. 582 [98 Pac. 145]), from which it is clear that no limitation is placed upon indebtedness to be incurred by municipalities of this class.

9. The question suggested, as to whether the district is likely to abuse the privilege in this respect, is legislative, and not judicial. It is not for the courts to say whether legislation is wise or unwise, reasonable or unreasonable, just, unjust, or oppressive. That function is for the legislative department only. For the courts to assume this prerogative would be dangerous in the extreme, as they, and not the people, would be virtually the framers of the constitution. It is the duty of the judicial departments to determine what the law is; not what it should have been. In determining the validity of an act we can look only to the power under the constitution of the lawmakers by whom it was passed, and not to the effect of the exercise of their constitutional authority.

10. This brings us to another and more difficult inquiry, which concerns the effect of including within the boundaries of the territory under consideration the incorporated towns of North Bend, Marshfield, East Marshfield, and Empire City, in one of which a majority voted against the organization of the port. This inclusion, it is main-

tained, is unconstitutional, in that the effect thereof is not only to amend and repeal parts of the charters of the municipalities thus included in violation of the Constitution of Oregon, Article XI, Section 2, as amended, but must necessarily result in imposing upon them indebtedness and taxes beyond the limitations prescribed in the sections last quoted. To begin, let it be remembered that municipal corporations of the class under consideration do not come within those designated as counties, cities, or towns, and that it was intended that municipalities other than those enumerated might be created, is obvious from the language used in section nine of the same article, namely: "No county, city, town, or other municipal corporation," etc. The clause "other municipal corporation" clearly implies and indicates that the framers understood and recognized that there may be corporations other than those enumerated, of which we have school districts, irrigation districts, road districts, drainage districts, and ports, such as the Port of Portland, etc. Since, therefore, as above held, provision may, under the constitution, be made by general laws for the incorporation of a municipality by the people of any certain locality, such power or right would become futile if the boundaries of any district thus organized must be restricted in such manner as to exclude all municipalities other than the one thus created. The right to form the larger municipalities must of necessity carry with it the power to include those more limited in territory regardless of the proportionate increase in the indebtedness and taxation to follow that may necessarily accrue to the included towns by reason thereof. The limitation placed upon the corporations enumerated applies only to each standing as a separate and distinct political division, and not to another and larger municipality of which they may form but an integral part. The entire constitution with amendments must be construed together, and to so interpret them either as to exclude other corporations or to limit their liability

in the manner suggested would be to defeat the very purpose of the provisions therein upon the subject.

11. The act under consideration by permitting the incorporation of ports does not thereby directly attempt to amend the charter of any city or town within the boundaries thereof. Under any view, it may only affect the charters and ordinances of such cities and towns to the extent that they may be in conflict or inconsistent with the general object and purpose for which the port may be organized. This the constitution clearly intended to permit; that is to say, a general law thereunder is provided whereby the people within the municipality created under it, may take such steps in support thereof as may be necessary, even though its success may require, on the part of the included municipalities, a surrender of some of the rights or privileges previously granted to or acquired by them. Incorporated cities and towns may change or amend their charters at any time in the manner provided by the constitution. The power to do so, however, is derived from the people of the State, and is necessarily limited to the exercise of such powers, rights, and privileges as may not be inconsistent with the maintenance and perpetuity of the State, of which public corporations are but the mere instrumentalities of government. In other words, the powers thus acquired do not rise higher than their source.

12. We find that the constitution, by permitting, through general laws, the exercise by municipalities of greater and more extensive prerogatives for other and different purposes, including the formation of ports, has thereby delegated to such larger districts the right to take such steps as may be essential to the carrying out of the general purpose and object of their creation. The exercise of this privilege does not necessitate the elimination of the city governments, nor of any substantial part of them, within any of the territory included; nor does it in any respect interfere with the general object or

purpose for which the included corporations were established. It may have the effect, it is true, of taking from them the control of wharves and docks, as well as some other privileges, whenever and wherever the exercise thereof becomes inconsistent with the object for which the port is incorporated. This, however, will in no degree take from any of the towns or the inhabitants thereof the exercise of, or prevent them from receiving, any of the benefits, rights, or privileges granted and given through the incorporated port to the rural citizens within the territory created by it, or to the public at large. Moreover, to the extent that the control and management thereof may be assumed by the more extensive municipality, the cities and towns included therein will be relieved of the burden and responsibility of maintaining or operating anything of the kind for the benefit of the public at large. True, the language used in the amendments considered would appear to give to incorporated cities the exclusive control and management of their own affairs, even to the extent, if desired, of legislating within their borders without limit, to the exclusion of the State. But, as stated, these provisions must be construed in connection with others of our fundamental laws, which can but lead to the conclusion above announced; and whatever may be the literal import of the amendments it cannot be held that the State has surrendered its sovereignty to the municipalities to the extent that it must be deemed to have perpetually lost control over them. This no State can do. The logical sequence of a judicial interpretation to such effect would amount to a recognition of a state's independent right of dissolution. It would but lead to sovereigntial suicide. It would result in the creation of states within the state, and eventually in the surrender of all state sovereignty—all of which is expressly inhibited by Article IV, § 3 of our national constitution. Power to enact local legislation may be delegated, but this of necessity, whether stated

or not, is always limited to matters consonant with, and germane to, the general purpose and object of the municipalities to which such prerogatives may be granted.

13. Municipalities are but mere departments or agencies of the State, charged with the performance of duties for and on its behalf, and subject always to its control. The State, therefore, regardless of any declarations in its constitution to the contrary, may at any time revise, amend, or even repeal any or all of the charters within it, subject, of course, to vested rights and limitations otherwise provided by our fundamental laws. This, under the constitution as it now stands, may be done by the legislature through general laws only, and the same authority may be invoked by the people through the initiative by either general or special enactments; only the legislature being inhibited from adopting the latter method.

Our attention is also called to the inclusion within the boundaries of the port what is known as the "Ten-Mile District." This, it is contended is irregular, because situated within a separate and distinct drainage basin. Since the port as incorporated does not include all of the county, nor extend "beyond the natural watershed of any drainage basin whose waters flow into another bay, estuary, or river navigable from the sea situate within such county," the inclusion therein of the "Ten-Mile District" is not inimical to any of the provisions of the act under which it is created.

Other points were suggested, but suffice to say, we have examined all the questions presented by the record, and find no error in the conclusion reached by the court below.

The decree is therefore affirmed.

AFFIRMED.

Argued March 31, decided June 8, rehearing denied July 20, modified August 24, 1909.

STATE v. WHITNEY.

[102 Pac. 288.]

HOMICIDE—INDICTMENT—SUFFICIENCY—VOLUNTARY HOMICIDE.

1. An indictment, alleging that accused feloniously and voluntarily administered a suppository containing poison to another, from the effects of which she died, was insufficient, under Section 1745, B. & C. Comp., making it manslaughter to voluntarily kill another upon a sudden heat of passion, but without malice and deliberation, in that it did not allege facts constituting voluntary manslaughter.

HOMICIDE—INDICTMENT—SUFFICIENCY—INVOLUNTARY MANSLAUGHTER.

2. An indictment, alleging that accused feloniously and voluntarily administered poison to another, from the effects of which she died, did not charge involuntary manslaughter, under Section 1746, B. & C. Comp., making it involuntary manslaughter to involuntarily kill another, while engaged in the commission of an unlawful act, or a lawful act without due caution, in that it did not allege facts showing any unlawful act, or a lawful act negligently committed.

HOMICIDE—INDICTMENT—MALICE—INVOLUNTARY MANSLAUGHTER.

3. In a prosecution, under Section 1746, B. & C. Comp., making it involuntary manslaughter to involuntarily kill another while engaged in the commission of an unlawful act, or a lawful act negligently committed, the indictment need not allege malice.

HOMICIDE—INDICTMENT—INTENT—INVOLUNTARY MANSLAUGHTER.

4. In a prosecution under Section 1746, B. & C. Comp., making it involuntary manslaughter to involuntarily kill another while engaged in the commission of an unlawful act, or a lawful act negligently committed, an indictment need not allege an intent to kill; the criminal element being the commission of an unlawful act, or a lawful act negligently committed, without intention to take life or to do great bodily harm.

From Multnomah: JOHN B. CLELAND, Judge.

Statment by MR. JUSTICE EAKIN.

The defendant was indicted by the grand jury of Multnomah County for the crime of manslaughter in the following language:

"G. B. Whitney is accused by the grand jury of the county of Multnomah, and State of Oregon, by this indictment, of the crime of manslaughter, committed as follows: The said G. B. Whitney on the 20th day of March, A. D. 1908, in the county of Multnomah, and State of Oregon, did feloniously and voluntarily kill one Mabel Wirtz, by voluntarily giving and administering unto her, the said Mabel Wirtz, on the 14th day of March, 1908, in the said county and state, one suppository con-

taining bichloride of mercury, a deadly poison, from the effects of which deadly poison, so given and administered, she, the said Mabel Wirtz, became mortally sick, and being so mortally sick, did languish from such sickness until the said 30th day of March, 1908, when the said Mabel Wirtz, in said county and state, died from the effects of such deadly poison, so voluntarily given and administered unto her," etc.

The defendant demurred to this indictment, for the reason that it does not state facts constituting an offense in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended, and that the facts stated do not constitute a crime, which was overruled by the court. Upon the trial a verdict was returned against defendant, finding him "guilty of manslaughter as charged in the indictment." From a judgment thereon defendant appeals.

REVERSED.

For appellant there was a brief with oral arguments by *Mr. William P. Richardson* and *Mr. John A. Jeffrey*.

For the State there was a brief over the names of *Mr. Andrew M. Crawford*, Attorney General, *Mr. George J. Cameron*, District Attorney, and *Mr. John J. Fitzgerald*, Deputy District Attorney, with oral arguments by *Mr. Cameron* and *Mr. Fitzgerald*.

MR. JUSTICE EAKIN delivered the opinion of the court.

1. Defendant was a practicing dentist at Forest Grove, Washington County, Oregon. The decedent was employed in a millinery store, and resided with her mother in Portland, who had recently moved from Forest Grove to that city for the benefit of her children, who had employment there; the father remaining at Forest Grove, where he conducted a business. At the trial it appeared that defendant had been keeping company with the decedent about three months, and he testified that they were engaged to be married. There was evidence tending to show that, a few days prior to the illness of decedent, the

defendant had procured from a drug store at Forest Grove, and delivered to decedent, a suppository of bichloride of mercury, to be used by decedent to avoid pregnancy, which was administered through the vagina, resulting in mercurial poisoning, from the effects of which decedent died within about two weeks from the time she first complained of illness. The statute (Section 1746, B. & C. Comp.) under which this indictment was attempted to be drawn provides:

"If any person shall, in the commission of an unlawful act, or a lawful act without due caution or circumspection, involuntarily kill another, such person shall be deemed guilty of manslaughter."

4. This, in substance, is the common-law definition of involuntary manslaughter. Blackstone, Com. 191; Section 1745, B. & C. Comp., is also common-law voluntary manslaughter, viz:

"If any person shall, without malice, express or implied, and without deliberation, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible, voluntarily kill another, such person shall be deemed guilty of manslaughter."

By Section 1303, B. & C. Comp., the indictment must contain a statement of the acts constituting the offense in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended. Under Section 1308, B. & C. Comp., the indictment must charge but one crime, and in one form only.

2. The indictment in this case does not charge voluntary manslaughter under Section 1745, B. & C. Comp., although it charges that he "did feloniously and voluntarily kill Mabel Wirtz," because it sets forth none of the acts constituting an offense under that section. Probably the words "feloniously and voluntarily" as used in the indictment, might be treated as surplusage, and the indictment be held good under Section 1746, B. & C.

Comp., if the acts charged constitute an offense. Wharton, Homicide, 335; *State v. Emerich*, 87 Mo. 116; *Chapman v. State*, 129 Ga. 855 (48 S. E. 350); *Sidberry v. State*, 149 Ind. 684 (39 N. E. 936).

3. It becomes important to determine whether it does state acts constituting involuntary manslaughter. The allegation in the indictment is "by voluntarily giving and administering unto her, the said Mabel Wirtz, on the 14th day of March, 1908, in said county and state, one suppository containing bichloride of mercury, a deadly poison, from the effects of which deadly poison, so given and administered, she, the said Mabel Wirtz, became mortally sick, * * and died." This allegation does not state facts disclosing an unlawful act, or a lawful act done without due caution and circumspection, or any act of criminality. It is not necessary to allege malice or intent to kill. The criminal element consists in doing the unlawful act, without any intention to take the life of decedent, or do her great bodily harm. It is therefore necessary that the indictment disclose that the act causing death was an unlawful act. Wharton, Homicide, at page 879, says:

"We have seen that causing death by unlawful acts not amounting to felony, or by lawful acts unlawfully done, constitutes involuntary manslaughter. To make an indictment for involuntary manslaughter good, it must be alleged that the accused was in the commission of some unlawful act, or of a lawful act unlawfully done, and that death resulted therefrom. * * And an indictment for a killing, not alleging that the doer was engaged in the perpetration of, or attempt to perpetrate, a crime or misdemeanor not amounting to a felony, is insufficient under a statute making it manslaughter in a specified degree to kill a human being without design to effect death by a person engaged in the perpetration of, or attempt to perpetrate, any crime or misdemeanor not amounting to a felony, in cases in which such killing would be murder at common law. And in charging the collateral crime or misde-

meanor, either the statutory language must be used, or the statutory ingredients must be substantially charged."

See, also, *State v. Emerich*, 87 Mo. 115; *People v. Huntington*, 138 Ca. 261 (70 Pac. 284). Wharton here refers to a statute in which the act that results in death differs from section 1746 of our statute, but this does not weaken his statement that the charge must disclose the commission of an unlawful act. And in *State v. Emerich*, 87 Mo. 115, it is held that the charge of involuntary manslaughter must state that act was done in the perpetration of a misdemeanor. *Connor v. Commonwealth*, 76 Ky. 714

4. Counsel for the State in his brief cites authorities to the effect that poison negligently administered, or administered with an evil purpose, in the event death follows, is manslaughter. However, it is not alleged that the poison was administered without due caution or circumspection, nor is an evil purpose alleged, and therefore these authorities do not aid the State. Where the charge is murder by poisoning, as is the case in some authorities cited, the indictment charges an intent to murder, thus disclosing an unlawful act, or evil purpose, and will support a verdict of involuntary manslaughter under Section 1746, B. & C. Comp. This was expressly held in *State v. Ellsworth*, 30 Or. 145, (47 Pac. 199), but in the present case the indictment is confined to a charge of a violation of Section 1746, without alleging an unlawful act. Therefore, the indictment is insufficient to charge a crime under that section, and the demurrer should have been sustained, and it is unnecessary to consider the other questions involved.

The judgment of the lower court will be reversed, and the cause remanded, with directions to sustain the demurrer, and for such other proceedings as may be proper.

REVERSED.

Argued August 17, Decided August 26, 1909.

HAINES v. CITY OF FOREST GROVE.

[108 Pac. 775.]

MUNICIPAL CORPORATIONS—INITIATIVE AND REFERENDUM—ADOPTION BY ORDINANCE—"ORDAIN."

1. General Laws 1907, p. 406, c. 226, § 12, provides that a petition for a proposed ordinance, charter, or amendment to the charter of any city shall be filed with the city clerk, who shall transmit it to the next session of the council, which shall either ordain or reject the same, as proposed, within thirty days thereafter; but if rejected, or no action is taken thereon within that time, it shall be submitted to the voters. *Held*, that the word "ordain" is employed in the sense of "adopt" or "approve"; that is, the council may either approve or reject the proposed charter or ordinance, after which proceedings may be taken as therein directed, and hence the adoption of a proposed charter by resolution, instead of by ordinance, was sufficient.

PLEADING—DEMURRER—CONSTRUCTION OF PLEADINGS.

2. When tested by demurrer, pleadings must be most strongly construed against the pleader.

MUNICIPAL CORPORATIONS—INITIATIVE AND REFERENDUM—TITLE.

3. General Laws 1907, p. 406, c. 226, § 12, provides that if any ordinance, charter, or amendment to the charter of any city shall be proposed by petition, and is not rejected or approved by the council within thirty days, the clerk shall submit the bill to the voters at the next ensuing election, and that, if the proposition meets with the approval of the council and they shall so ordain, it may either be submitted to the voters or the council may declare and thereby make it effective without such submission. *Held*, that where a charter was properly proposed and submitted under a resolution approving the bill, the adoption having been regular, the title, reciting that it was a bill "to propose * * by initiative petition," was sufficient, though it did not appear that it was proposed by a resolution of the council.

MUNICIPAL CORPORATIONS—INITIATIVE AND REFERENDUM—TITLE.

4. General Laws 1907, p. 398, c. 226, relating to the initiative and referendum, provides in Section 5 that when any measure shall be filed with the Secretary of State to be referred to the people, or shall be proposed by initiative petition, a copy thereof shall be transmitted to the Attorney General, who shall provide a title for the measure. Section 10 provides that as to cities and towns the duties required of the Attorney General by the act shall be performed by the city attorney as to municipal legislation. *Held*, that where the title to a bill proposing an amended charter was adequate, and the city at the time of the proceedings had no city attorney, failure to have the title prepared by the city attorney did not invalidate the election.

MUNICIPAL CORPORATIONS—ELECTIONS—WHAT CONSTITUTES A MAJORITY.

5. In a city having three hundred and thirty legal voters, who were qualified to vote upon the question of the adoption of a new charter, but one hundred and sixty-two votes were cast, ninety-two for and seventy against the proposed charter. *Held*, that only a majority of those voting is all that is required to adopt the new charter, and when the statute is silent, it will be presumed that the electors who do not vote are in favor of the measure.

From Washington: JAMES U. CAMPBELL, Judge.

This is a suit by E. W. Haines against the City of Forest Grove, B. H. Laughlin and R. P. Wirtz, the Mayor and Recorder respectively of said city, to enjoin said defendants from issuing bonds for the purpose of securing and constructing a water system for the city. From a decree entered on an order sustaining a general demurrer to the complaint, plaintiff appeals.

AFFIRMED.

For appellant there was a brief with an oral argument by *Mr. John M. Wall*.

For respondent there was a brief with an oral argument by *Mr. W. H. Hollis*.

MR. JUSTICE KING delivered the opinion of the court.

This is an appeal from a decree entered upon an order sustaining a general demurrer to the complaint. The suit was instituted to test the right of the city of Forest Grove to issue and sell bonds for the securing and constructing of a water system. The proceeding involves the validity of the city charter and the regularity of the proceedings thereunder, in reference to which it is contended that there has been a failure to comply with the general law of 1907 (Gen. Laws 1907, p. 398, c. 226), providing for the carrying into effect of the initiative and referendum powers reserved by the people in Section 1 and Section 1a of Article IV of the Constitution in regard to municipal legislation.

1. Taking them in their logical order, the first point presented for consideration questions the regularity of the action of the committee appointed to draft the charter under which it is proposed to issue bonds. It is argued that since the report of the committee was approved by resolution, instead of by ordinance, the action thus taken was not in compliance with the provisions of the act (Gen. Laws 1907, p. 398, c. 226) on the subject. Section 12 of the act provides, *inter alia*,

that if any ordinance, charter, or amendment to the charter of any city shall be proposed by petition, such petition shall be filed with the city clerk, auditor, or recorder, who shall transmit it to the next session of the council; that the council shall either ordain or reject the same as proposed, within 30 days thereafter; but if rejected, or no action is taken thereon within that time, it shall be submitted to the voters of the city or town at the next ensuing election. It will thus be seen that the manner of proceeding is clearly indicated in the general act. We do not understand that, merely because the word "ordain" is used, this necessarily implies that the proposed charter must first have been approved by the passage of an ordinance. The word "ordain," as used in this connection, is employed in the sense of "adopt" or "approve" (Words & Phrases, p. 5016); that is to say, the council may either approve or reject the proposed charter or ordinance, after which proceedings may be taken as therein directed. In view of the language used in the act, and no specific requirements to the contrary appearing either in the constitution as amended or in the general law on the subject, we are of the opinion that the adoption by resolution was sufficient, and that error cannot be predicated thereon.

2. The next contention is that but 55 days intervened between the time of the adoption of the resolution approving the charter—including the filing of the same with the clerk for submission to the voters—and the date of the election at which it was voted upon. One of the averments in the complaint would indicate that the time was insufficient; but a subsequent allegation therein discloses that the proposed charter was ordained, or approved, and filed with the clerk on November 11, 1908. Now, since it further appears that the election at which it was adopted by a vote of the people occurred on January 11, 1909, more than 60 days elapsed between the date of the filing and the election. We have for determi-

nation only the question as to whether the facts alleged are sufficient to entitle plaintiff to the injunctive relief demanded. It is a well-established rule that pleadings, when tested by demurrer, must be construed most strongly against the pleader. Applying this rule here, the time required intervened between the time of filing and the date of the election, by reason of which plaintiff's position is untenable.

3. It is maintained that since the title to the bill submitting the amended and adopted charter to a vote, recites that it is a bill "to propose * * by initiative petition," instead of appearing that it was proposed by a "resolution" of the council, it fails to meet the legal requirements in this regard. It will be observed from Section 12 of the Act of 1907 that more than one way is provided by which charters, amendments thereto, and ordinances may be adopted and become operative. The first is by petition, known as the "initiative," by which the matter is called to the attention of the council, whereupon, if it shall not within 30 days be rejected or approved by that body, the clerk is required to submit the bill to the voters of the city, town, or proposed city or town, at the next ensuing election. Another method provided is that, in the event the proposition shall meet with the approval of the council and they shall so ordain, it may either be submitted to the voters for their approval or rejection, or the council may declare, and thereby make it effective without such submission. Other provisions are made respecting amendments, etc.; but the above statement is adequate to a proper determination of the controverted point. In the case at hand the new charter was proposed by the initiative in strict conformity to the requirements of the law, and approved by the council by resolution, and, in accordance with the requirements of the general law on the subject, was submitted to the voters and adopted by them. The question as here presented could only arise in the event the council

had rejected or neglected to act upon the petition in the first instance, and the petitioners had thereafter submitted the same to a vote; but having been submitted under a resolution approving the bill, and the adoption by resolution having been regular, the title is sufficient.

4. It is next argued that Section 10, when construed in connection with Section 5 of the general act, requires that before the bill proposing a new charter, amendment, or ordinance shall be voted upon, it shall first be submitted to the city attorney for his approval, whereupon he shall prepare and return to the clerk a form of title for the proposed measure. It appears, however, that the city of Forest Grove, at the time of these proceedings and for some time prior thereto, had no city attorney. Not having an officer of this kind, and the title being adequate to meet all the requirements of the law, we are of the opinion that this irregularity—if it may be termed such—will not invalidate the election. If the question were before us in a proceeding questioning the right to hold, or seeking to enjoin, an election until the provisions of the law respecting the subject shall have been complied with, a different question would be presented.

5. It is also suggested that since it appears there were 330 legal voters in the city of Forest Grove who were qualified to vote at the time of the adoption of the new charter, and that but 162 votes were cast, of which 92 voted for the charter and 70 against it, less than a majority voted for its adoption, by reason of which the result does not represent the will of the majority, and is, therefore, void. The general law under which the election was held makes it clear that only a majority of those voting is necessary to make effective the bill, charter, ordinance, or other matter voted upon, from which it is manifest that error cannot be predicated on that ground. But, were the statute silent upon the subject, it would be presumed that all qualified voters opposed

to a bill affecting their municipality would manifest sufficient interest in public affairs to vote thereon, and that those who do not vote are in favor of the measure.

Other errors are suggested; but, not deeming them important, the decree of the circuit court will be affirmed.

AFFIRMED.

Argued May 7, Decided July 27; notice for rehearing denied Sept. 21, 1909.

SIMPSON v. HARRAH.

[108 Pac. 58.]

WATERS AND WATER COURSES—IRRIGATION—EVIDENCE—FINDINGS.

1. In a suit to enjoin defendant from interfering with the flow of water into complainant's irrigation ditch, evidence held to warrant a finding that defendant had unlawfully diverted the water from the main ditch, and that this was the cause of plaintiff's water shortage and the impairment of his crops.

WATERS AND WATER COURSES—IRRIGATION—RIGHTS TO WATER—PLEADING.

2. Where, in a suit to enjoin defendant from interfering with the flow of water in plaintiffs' ditch, defendant by answer made no claim to any water nor title to any land, and plaintiffs claimed no definite quantity of water, and did not prove the amount to which they were entitled, a decree attempting to establish plaintiffs' title to a definite amount of water, and to settle the rights of the parties as to the water flowing in the main ditch, was erroneous.

APPEAL AND ERROR—REHEARING—GROUNDS—MISTRIAL OF ISSUES.

3. Where the complaint alleged that defendant had been, during the season of 1907, and then was, wrongfully diverting water from the main ditch described, which the evidence showed, as well as that the water did not reach the division box, a contention made, as a ground for rehearing, that the controversy was not over the water which flowed into the main ditch, but over that at the division box, was untenable.

From Umatilla: HENRY J. BEAN, Judge.

This is a suit by James Simpson and Ann E. Simpson against G. M. Harrah to enjoin defendant from interfering with the right of plaintiffs to irrigate their lands from the irrigation ditch running from the Middle Walla Walla River. From a decree in favor of plaintiffs, defendant appeals.

MODIFIED.

For appellant there was a brief with oral arguments by *Messrs. T. P. and C. C. Gose*.

For respondent there was a brief with oral arguments by *Messrs. Lowell & Winter*.

MR. JUSTICE EAKIN delivered the opinion of the court.

Plaintiffs are the owners of a 17-acre fruit farm, being a portion of the west one half of section 14, township 6 north, range 35 east Willamette Meridian, Umatilla County, Oregon, and they are the owners, as described in their deed, of "the right to take sufficient water to irrigate all of the above described land from the main irrigation ditch, which said main ditch runs from the Middle Walla Walla River to the west line of the east half of the southwest quarter of section 14, * * and to convey the said water in such manner as may be desired, by flume, ditch, or otherwise, along the west line of the east half of the southwest quarter of said section 14," etc. Defendant admits plaintiffs' ownership of the land described, and that it is devoted to the growth of fruits, vegetables, and alfalfa, and denies the other allegations of the complaint, but makes no claim to the water or right to the use thereof. The main ditch, which furnishes water to others besides plaintiffs and defendant, is taken from the Little Walla Walla River in the southeast quarter of the southwest quarter of section 14, extending north, and at the northwest corner of the southeast quarter of the southwest quarter of section 14 it is divided, and the ditch through which plaintiffs and defendant divert water from the main ditch continues northerly 20 or 25 rods, where it is divided between them.

1. Thus but one question is presented upon the evidence, namely: Did defendant deprive plaintiffs of the use of the water as alleged in the complaint? Upon that issue plaintiff, James Simpson, testifies that during the season of 1907 he was not able to get sufficient water to produce his crop, consisting of fruit, melons, vegetables, and alfalfa; that his crops were nearly ruined, and much of his alfalfa killed, to his damage in the sum of \$500; that defendant Harrah prevented them from having any

water at all that year; that Harrah put a dam in the ditch and turned the water down the main creek. Defendant does not dispute the testimony of plaintiff, James Simpson, to the effect that defendant turned the water from the main ditch into the creek. He says he did not obstruct the flow of the water at the division box or at any point on plaintiffs' ditch, but does not deny that he maintained the dam at the head of the main ditch. The allegation of the complaint is that defendant diverted the water from the main ditch and turned it down the creek. We think the evidence fully supports the findings of the trial court as to the cause of the shortage of water and its effect upon plaintiffs' crops.

2. It is urged that the court erred in rendering a decree in favor of plaintiffs, for the reason that plaintiffs and defendant had signed an agreement between them dividing the water at the division box; but that agreement is not involved here. Defendant by his answer makes no claim to any water, and tenders no issue as to the agreement, and plaintiffs do not complain of any diversion at the division box, but at the head of the main ditch; therefore we are not called upon to construe the agreement for the division of the water. Neither the pleadings nor the proof are sufficient to enable us to determine the water rights between plaintiffs and defendant as to the quantity of water either one needs or is entitled to, or as to their relative proportions of the water in the ditch. The evidence establishes plaintiffs' right to sufficient water to irrigate these 17 acres; that defendant wrongfully diverted the water from the main ditch; and that plaintiffs' crops were damaged by reason thereof. Defendant does not dispute plaintiffs' title to the water, except by offering in evidence an agreement between plaintiffs and defendant, by which it is provided that plaintiffs are entitled jointly to one-third of the water conveyed in a certain ditch known as the "Ingle ditch," and that defendant is entitled to 64 per cent thereof and

plaintiffs to 36 per cent, but there is no issue as to the division of the water at the box. Defendant is charged with preventing the water from flowing into the main ditch, and this is established by a preponderance of the evidence. We think, however, that the trial court went beyond the issues in dividing the water between plaintiffs and defendant. Defendant has alleged or shown no right to any water nor title to any land, except at the trial plaintiffs admitted that defendant "is the owner of the lands described in the complaint." But this is unintelligible taken in connection with the pleadings. Plaintiffs' land is described in the complaint, and the answer admits that "plaintiffs are the owners of the land described in said complaint." The complaint also describes the east one half of the southwest quarter of section 14, over which a portion of the ditch is constructed, but clearly the plaintiffs do not mean to admit that defendant is the owner of that 80 acres, and the record indicates he is not. But this is immaterial, as there is no issue tendered in relation thereto. When these issues arise, they can be tried out.

Plaintiffs have claimed no definite quantity of water nor does the evidence disclose the amount to which they are entitled, and therefore the decree cannot establish their title to any definite quantity of water or settle the relative rights of plaintiffs and defendant. The only relief the court can grant is to enjoin defendant from preventing, or in any manner interfering with the flow of the water from the Little Walla Walla River into the main ditch, and to give plaintiffs judgment for \$300 damages, allowed by the lower court, which we find was suffered by plaintiffs, and a decree will be rendered here accordingly, neither party to recover costs of this appeal.

MODIFIED.

Decided September 21, 1909.

ON MOTION FOR REHEARING.

[108 Pac. 1007.]

MR. JUSTICE EAKIN delivered the opinion of the court. Counsel, by this motion, urges that the controversy was not over the water which flowed in the main ditch at its intake, but was over the water at the division box; but in this he is in error. The charge in the complaint is "that the defendant has been, during the season of 1907, and now is, wrongfully and unlawfully diverting the water from the main ditch above described," and this was sustained by the proof. The evidence shows that the water did not reach the division box, but was diverted at the creek. The case cannot be retried, as suggested by counsel, upon the points urged, without new pleadings, and this court is not the forum in which to seek such relief.

The motion is denied.

MODIFIED: REHEARING DENIED.

Argued May 6, decided July 23, rehearing denied September 21, 1909.

BIGELOW v. COLUMBIA GOLD MINING CO.

[108 Pac. 56; 108 Pac. 1007.]

APPEAL AND ERROR—SUFFICIENCY OF BILL OF EXCEPTIONS.

1. Under Section 171, B. & C. Comp., providing that "the objection shall be stated with so much of the evidence or other matter as is necessary to explain it, but no more," a bill of exceptions which consists only of the entire transcript of the stenographer's notes taken at the trial is sufficient to bring up for consideration the assignment of error that the court erred in denying defendant's motion for a nonsuit, and that it erred in refusing a motion for a directed verdict for defendants, as consideration of those assignments requires that the bill contain all the evidence before the court at the time the motion was made, but the bill is not sufficient to present other assignments of error.

MASTER AND SERVANT — ACTIONS FOR INJURIES — SUFFICIENCY OF EVIDENCE—NEGLIGENCE.

2. Evidence, in an action against a master to recover for injuries to a servant, *held* to make the question of defendant's negligence and whether plaintiff assumed the risk incident to machinery around which he was working, for the jury.

MASTER AND SERVANT — ACTIONS FOR INJURIES — SUFFICIENCY OF EVIDENCE—CONTRIBUTORY NEGLIGENCE.

3. Evidence, in an action against a master for injuries to a servant, *held* sufficient to make the question of contributory negligence for the jury.

PLEADING—ISSUES AND PROOF—MATTERS TO BE PROVED—ADMISSIONS.

4. In an action against a master for injuries to a servant, the complaint alleged that plaintiff was caught upon a revolving shaft by a set screw, and the answer alleged that plaintiff, who was working around and attempting to oil the machinery, allowed his clothing to "drop down on the shaft and under the guard, so that it came in contact with the said set screw, * * and he was drawn into the said machine." *Held*, that the admission in the answer renders unnecessary any proof that plaintiff's clothes caught on the set screw.

APPEAL AND ERROR—BILL OF EXCEPTIONS—NECESSITY—WAIVER—POWER.

5. A bill of exceptions is required by statute, and not by court rules, so that counsel cannot waive a bill of exceptions, where it is necessary to raise the question presented for review, or stipulate to submit the case on a *trah*-script of the evidence.

APPEAL AND ERROR—BRIEFS—STATEMENT OF FACTS—FAILURE TO DENY.

6. Respondent need not object to the statement of fact made in appellant's brief and does not assent thereto by his failure to deny.

From Baker: WILLIAM SMITH, Judge.

Statement by MR. JUSTICE EAKIN.

This is an action by Ira E. Bigelow against the Columbia Gold Mining Co. for damages resulting from personal injuries received by plaintiff in operating an electric power pump. The defendant is engaged in operating the Columbia Gold Mine, in Baker County, Oregon, and at the 500-foot level uses a triplex electric power pump, which plaintiff is employed to operate; part of his duties being to attend to the automatic oilers. On the side next to the motor is a shaft, five or six feet long, with a pulley on one end, connected by a belt to the motor, and on the other end is a gearing, the shaft being about three and one-half feet above the floor. When in operation the shaft makes 400 revolutions a minute. There is a collar on the gear end of the shaft, close to, and on the opposite side of, the boxing from the gear, fastened to the shaft by a set screw to prevent the shaft from longitudinal motion, and revolving with the shaft. The shaft is about two and one-half inches in diameter, and the collar is about one and one-half inches wide, and about one and one-quarter inches thick, and the set screw is in the center of the collar, and projects about one inch

from the surface of the collar. Over this set screw is placed a sheet iron guard, about three and one-half inches wide. The three plungers are operated vertically by a series of cranks upon a shaft about five and one-half feet above the floor, and there are automatic oilers on top of these plunger cranks, and also on the boxing. On February 8, 1908, about 6:30 A. M., plaintiff, in the discharge of his duties, was adjusting the oilers on top of the plunger cranks, which were about as high as he could reach. He was standing on the side of the pump next to the shaft, and in some manner his clothing was caught and wound around the shaft, tearing all the clothing from his body, and throwing him upon the shaft and against the plungers, from which he received very serious injuries, tearing off pieces of his scalp and burning the skin upon his legs and body. Plaintiff alleges that it was defendant's duty to cover and safeguard the set screw to render the same safe for plaintiff; that the guard placed thereon was so insecurely fastened, and of such thin material, that it was easily broken loose, and was so placed thereon that it did not cover the set screw completely, although it had the appearance of affording protection therefrom, and was thus rendered unsafe, and, in fact, dangerous, and was the cause of the injury complained of; that the dangerous and unsafe condition thereof was well known to defendant, or could have been known by due diligence, prior to the time of the injury received by plaintiff.

Defendant denies the allegations of the complaint, alleging affirmatively that the set screw was safeguarded, and was in a reasonably safe condition; that plaintiff knew and appreciated the danger and assumed the risk thereof; that plaintiff was guilty of contributory negligence in taking an unsafe place to work when there was a safe place on the other side of the pump, and in wearing loose clothing while working about the machinery.

Upon the trial plaintiff recovered a verdict, and from a judgment thereon defendant appeals. **AFFIRMED.**

For appellant there was a brief over the names of *Mr. Charles A. Johns* and *Mr. Ralph W. Wilbur*, with an oral argument by *Mr. Johns*.

For respondent there was a brief over the names of *Messrs. Hart & Nichols*, with an oral argument by *Mr. Julius N. Hart*.

MR. JUSTICE EAKIN delivered the opinion of the court.

1. After argument of the case in this court plaintiff filed a motion to affirm the judgment, for the reason that the only bill of exceptions filed is the entire transcript of the stenographer's notes taken at the trial, which is not a bill of exceptions contemplated by statute. The first assignment of error is that the court erred in denying defendant's motion for a nonsuit. The consideration of this assignment requires that the bill of exceptions shall contain all the evidence before the court at the time the motion was made: *Schaefer v. Stein*, 29 Or. 147 (45 Pac. 301). The same is true of the second assignment of error, namely, the motion for a directed verdict. Therefore, for consideration of these two questions, the bill of exceptions is sufficient, and the motion must be denied. But as to the other exceptions the bill does not comply with the statute (Section 171, B. & C. Comp), which provides that "the objection shall be stated with so much of the evidence or other matter as is necessary to explain it, but no more." This question has been decided by this court so often that it seems needless to review it again. In the case of *Hamilton & Rourke v. Gordon*, 22 Or. 561 (30 Pac. 496), the court in passing on this question says: "A motion was filed in this court by respondents to strike the bill of exceptions from the files, because it is nothing but a copy in longhand of the reporter's notes of the trial. We are not aware of any

rule of law or practice authorizing us to strike from the files that part of the transcript signed and allowed by the trial judge, and made a part of the record in the court below as a bill of exceptions; but we are equally certain that there is no rule of law requiring us to examine, in search of errors, such an alleged bill of exceptions, unless it is prepared in the manner provided by law. We have heretofore, in some instances, when it was difficult to clearly ascertain the question sought to be presented, declined to do so, and shall follow the same practice in the future when the occasion presents itself." It is imperatively necessary that the exceptions be distinctly stated in the bill, and that about each exception be grouped sufficient facts to show the nature and influence of the ruling complained of: *Nosler v. Coos Bay Nav. Co.*, 40 Or. 305 (63 Pac. 1050; 64 Pac. 855); *Eaton v. Oregon R. & N. Co.* 22 Or. 501 (30 Pac. 311). For a suggestion to the form of the statement of facts in the bill of exceptions, see *Tucker v. Salem F. & M. Co.* 15 Or. 585 (16 Pac. 426). And it is said in *Hedin v. Railway Co.* 26 Or. 155 (37 Pac. 540): "It is generally deemed essential that all evidence introduced prior to the motion for a nonsuit should be incorporated in a bill of exceptions when the order of the court overruling or sustaining such a motion is brought up for review * * [but that] is no reason why other questions, and the particular errors relied upon, should not be separately stated and pointed out": *Eaton v. Oregon R. & N. Co.* 22 Or. 501 (30 Pac. 311). This is the only question involved in *Eaton v. Oregon R. & N. Co.* 22 Or. 501 (30 Pac. 311), where the whole subject is thoroughly reviewed by Mr. Justice BEAN, and Mr. Chief Justice MOORE in *Oldland v. Oregon Coal & N. Co.* (decided June 15, 1909) 102 Pac. 596, says: "We believe that an average of 1½ pages of testimony, or of a statement of the substance thereof, would have been all that was required to explain any exception saved." Therefore,

as to all the assignments of error, excepting the first two, there is no bill of exceptions before us, and they will not be considered.

2. The grounds of the motion for a judgment of non-suit are: (1) That the evidence does not show any negligence on the part of defendant; (2) that it does show an assumption of risk by plaintiff; (3) contributory negligence by plaintiff; (4) and that it is not shown that plaintiff came in contact with the set screw. The negligence of defendant relied on by plaintiff is that the set screw was not reasonably safeguarded, but had a loose, frail, and insufficient guard, and yet had the appearance of being safe. The evidence tends to show that the set screw was dangerous if not safeguarded; that about a month before the accident, Culligan, who also operated this pump, one shift during the time prior to the injury, and who was not a mechanic, at his own suggestion and for his own protection, placed a guard over the set screw, which was made of light sheet iron, fastened at one side to one of the boxing bolts, and was unsupported at the other side; that he cut it out with a pair of shears, and shaped it with his hands, and it extended down over the set screw about even with the lower side of the shaft. He said he put it there because he felt afraid of the set screw when oiling the cups on the boxing, and he felt perfectly safe when it was on. After the accident it appeared that the guard had been torn off, and plaintiff's pants, coat, and shirt had been wound around the shaft; his coat and shirt were next to the set screw and his pants toward the other end. Plaintiff testifies that he thought the guard was safe, and relied on it. We think it cannot be said, as a matter of law, that under existing conditions the set screw was reasonably safeguarded, or that plaintiff assumed the risk incident thereto. It was for the jury to say whether the set screw was reasonably safeguarded, and whether plaintiff was justified in assuming that it was safe.

3. The only contributory negligence disclosed by the evidence, or charged against plaintiff, consists in wearing a coat while working about the machine, and in taking an unsafe place to work. He wore an ordinary, close-fitting, buttoned coat. He says he always wore it while at work, because it was uncomfortably cold down there, even with the coat on. He also testifies that it was necessary for him to stand on the shaft side of the pump, when adjusting the cups; that it was the safest place, and the only convenient and customary way. Although there was evidence tending to show that the oil cups, at the top of the crank shaft, could have been adjusted from the other side of the pump with safety, yet it was for the jury to say whether it was negligence for him to wear a coat or to regulate the oilers from the shaft side of the pump.

4. In the brief, counsel for defendant urge that the evidence does not establish that plaintiff's clothes caught on the set screw, and that, if he failed to prove that he was hurt in the manner alleged, he cannot recover. The allegation of the complaint is that the plaintiff was caught upon said revolving shaft by said set screw. The answer admits this in the following language: "Plaintiff, while working around the said machinery, and while attempting to oil the same, reached over the said pump, thereby allowing his clothing to drop down on the shaft and under the guard so that the same came in contact with the said set screw * * and he was drawn into the said machine." This admission renders unnecessary any proof upon that point, and we find that the motion for judgment of nonsuit was properly denied, and the evidence for the defense is not sufficient, on any of these points, to justify the court in directing a verdict for the defendant.

Judgment is affirmed.

AFFIRMED.

Decided September 21, 1909.

ON PETITION FOR REHEARING.

[108 Pac. 1007.]

MR. JUSTICE EAKIN delivered the opinion of the court.

5. By the motion for rehearing, counsel urge: That, as the court must read the evidence for the consideration of the motion for nonsuit, therefore it ought to consider the errors disclosed by the transcript of the evidence; that some of the exceptions relate to general principles of law and can be passed upon independently of the evidence; and that appellant has stated in his brief sufficient of the evidence for the consideration of the exceptions relied upon, and, respondent having made no objections to such statement, therefore appellant's brief should be taken as the bill of exceptions. The effect of these contentions is that the court should permit counsel to waive the bill of exceptions or stipulate to submit the case on the transcript of the evidence. The bill of exceptions is required by the statute, and not by a rule of the court, as counsel suggests. This is a plain statute and has been construed and explained by this court in many cases.

6. Counsel for respondent is not called upon to object to the statements of fact made in his adversary's brief, and such statements cannot be taken as assented to. The exceptions not considered by the court were such as could not be raised in this court except by the bill of exceptions.

The motion for rehearing is denied.

AFFIRMED: REHEARING DENIED.

Submitted on briefs May 6, decided July 13, rehearing denied
September 21, 1909.

OFFICER v. MORRISON.

[102 Pac. 792.]

INJUNCTION—LIABILITIES ON BONDS—COSTS.

Under Section 418 B. & C. Comp., providing that, before injunction is granted, the plaintiff shall give an undertaking to pay all costs, disbursements and damages, not exceeding an amount therein specified, as defendant

may sustain by reason of the injunction if the same be wrongful, an injunction plaintiff and his surety, on a bond limiting the damages to \$100, is liable for the costs and disbursements awarded to defendant when the suit was dismissed on appeal after the injunction had been made perpetual below, although the costs and disbursements exceed the sum of \$100, as the limitation to that amount applies simply to the amount of damages.

From Grant: GEORGE E. DAVIS, Judge.

Statement by MR. CHIEF JUSTICE MOORE.

This is an action by Floyd L. Officer against Finlay Morrison and C. G. Guernsey on an injunction bond to recover the costs and disbursements which the plaintiff incurred in defending a suit.

The complaint alleges, in effect, that Morrison commenced a suit against Officer to prevent the latter from interfering with the flow of water from a spring, and, in order to secure a temporary injunction, Morrison as principal and Guernsey as surety gave an undertaking, conditioned "that, in case said injunction shall issue, the said plaintiff will pay all costs and disbursements that may be decreed to the defendant and such damages, not exceeding the amount of \$100, as he may sustain by reason of said injunction, if the same be wrongful or without sufficient cause"; that a preliminary injunction was thereupon issued and served upon Officer, whose motion to dissolve the writ was overruled; that issue was joined in the suit, a trial had, and the injunction made perpetual, but upon appeal the decree was reversed and the suit dismissed: *Morrison v. Officer*, 48 Or. 569 (87 Pac. 896); that a mandate was sent down and Officer was awarded the costs and disbursements which he had incurred in both courts, amounting to \$278.60; and that the issuing of the temporary injunction was wrongful and without sufficient cause.

A demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action was sustained, and, the plaintiff declining to amend his primary pleading, the action was dismissed, and he appeals.

REVERSED.

Submitted on briefs under the proviso of Rule 16 of the Supreme Court: 50 Or. 580 (91 Pac. XII).

For appellant there was a brief over the names of *Messrs. Hicks & Marks*.

For respondent there was a brief over the name of *Mr. V. G. Cozad*.

Opinion by MR. CHIEF JUSTICE MOORE.

The question to be considered is whether the costs and disbursements awarded to Officer when the suit against him was dismissed, can be recovered in an action on the undertaking for an injunction which conformed to the requirement of the statute. The enactment, regulating the granting of a restraining order, is as follows:

"An injunction may be allowed by the court, or judge thereof, at any time after the commencement of the suit and before decree. Before allowing the same, the court or judge shall require of the plaintiff an undertaking, with one or more sureties, to the effect that he will pay all costs and disbursements that may be decreed to the defendant, and such damages, not exceeding an amount therein specified, as he may sustain by reason of the injunction if the same be wrongful or without sufficient cause": Section 418, B. & C. Comp.

In *Drake v. Sworts*, 24 Or. 198 (33 Pac. 563), in construing a statute relating to undertakings for attachment, in which the language was almost identical with the foregoing enactment, towit, "That the plaintiff will pay all costs that may be adjudged to the defendant and all damages which he may sustain by reason of the attachment; if the same be wrongful or without sufficient cause, not exceeding the sum specified in the undertaking" (Section 298 B. & C. Comp.), it was held that the sureties were liable to the defendant on an undertaking for an attachment which contained the statutory condition in case a judgment was rendered in favor of such defendant for all the costs in the action, and not simply for such expenses as he may

have incurred on account of the attachment. In deciding that case Mr. Justice BEAN says: "Under this statute there are plainly two obligations assumed by the parties to an undertaking for attachment: (1) That the plaintiff will pay all costs, which, of course, includes disbursements that may by the court in which the action is tried be adjudged to the defendant; and (2) if the attachment is wrongful and without sufficient cause, to pay such damage as the defendant may sustain by reason of the attachment. These are separate and distinct obligations, independent of each other, the latter of which may happen without the former, and even if the plaintiff should prevail in the action. This, it seems to us, is the plain and obvious meaning of the statute, and so clearly expressed that it cannot be construed so as to limit the obligation to the costs incurred in the attachment. We are aware, of course, that this construction makes the undertaking for an attachment a security for costs in case the defendant prevails in the action, but it was wholly within the power of the legislature to impose such conditions if the plaintiff is to seize the defendant's property upon an attachment even before a cause of action has been established, and the court is bound to give the statute effect, according to its language and evident intent." We think the decision rendered in that case is controlling herein. Though the undertaking in the case at bar limits the recovery of damages to the sum of \$100, no restriction is placed on the costs and disbursements which may be obtained when an injunction is dissolved.

For the error committed in sustaining the demurrer and dismissing the action, the judgment is reversed and the cause remanded for such further proceedings as may be necessary, not inconsistent with this opinion.

REVERSED.

MR. JUSTICE KING, having been of counsel for one of the parties to the original suit, took no part in the consideration hereof.

Argued July 22, decided September 21, 1909.

STATE v. HEMBREE.

[108 Pac. 1008.]

CRIMINAL LAW—EVIDENCE—OTHER OFFENSES.

1. While proof of other offenses having no connection with that charged, is ordinarily inadmissible, the State, to establish intent or motive, may show other crimes committed by accused which are connected with the offense charged.

CRIMINAL LAW—ELEMENTS OF CRIME—MOTIVE.

2. The existence of a motive for the commission of a crime is not indispensable to conviction, though such proof is of great importance in cases depending on circumstantial evidence.

CRIMINAL LAW—EVIDENCE—INFERENCES—INFERENCE ON INFERENCE.

3. Under Section 783, B. & C. Comp., defining inference as a deduction which the reason of the jury makes from the facts proved without any express direction of law, and Section 785, requiring an inference to be founded on a fact legally proved, or on such a deduction from that fact as is warranted by the usual propensities or passions of men, etc., an inference cannot be predicated upon an inference, so that where accused's sexual intercourse with his daughter was not legally proved as a fact, it would not support an inference of motive for the killing of his daughter and wife.

CRIMINAL LAW—EVIDENCE.

4. The presence of semen on a bed sheet cannot be held to be shown by evidence of the existence of a whitish liquid on, or a starchy condition of, the sheet, but the existence of spermatozoa should have been established therein.

CRIMINAL LAW—EVIDENCE.

5. The relationship of father and daughter excludes any presumption of sexual relations between them merely from their intimate association, and a much greater degree of proof would be necessary to justify a criminal inference than if such relationship had not existed.

HOMICIDE—SUFFICIENCY OF EVIDENCE—MOTIVE.

6. In a prosecution for murder by setting fire to accused's house in which his wife and daughter were burned, where the State's theory was that accused had committed incest with his daughter, of which his wife had learned, thus furnishing a motive for the crime, evidence held not to establish incest as a fact in evidence.

From Polk: **GEORGE H. BURNETT**, Judge.

The defendant, **A. J. Hembree**, was tried and convicted of murder in the first degree, and from the sentence following such conviction, he appeals. **REVERSED.**

For appellant there was a brief over the names of *Messrs. McCain & Vinton*, *Mr. Martin L. Pipes* and *Mr. George A. Pipes*, with oral arguments by *Mr. Martin L. Pipes* and *Mr. James L. McCain*.

For the State there was a brief over the names of *Mr. Andrew M. Crawford*, Attorney General, *Mr. John H. McNary*, District Attorney, and *Mr. W. H. Cooper*, Deputy District Attorney, with oral arguments by *Mr. McNary* and *Mr. Isaac H. VanWinkle*, Assistant Attorney General.

Opinion by MR. CHIEF JUSTICE MOORE.

The defendant, A. J. Hembree, was convicted of the crime of murder in the first degree alleged to have been committed in Tillamook County, December 28, 1905, by killing his wife, and he appeals from the judgment of death which followed. His counsel contend, *inter alia*, that an error was committed in admitting, over objection and exception, testimony from which the jury were improperly permitted to base an inference on an inference.

Before considering the question presented, it is deemed prudent to state the substance of the material evidence relating to the case as developed at the trial. For some time prior to the alleged homicide the defendant had lived on a farm at Sandlake, in the county named. His family consisted of his wife, their daughter Ora, about eighteen years old, and their sons, Lawson and Roy, then fourteen and twelve years old, respectively. These boys on December 26, 1905, went about 16 miles from home to visit relatives, and three days thereafter, and prior to their return, their father, at 2:45 A. M., was heard breathing very hard as he approached the residence of Mr. Hoyt, who lived a mile and a quarter from his place, and, as he entered the house, he inquired if his wife and daughter had arrived. Upon receiving a negative answer, he stated that his house had burned, and that Mrs. Hembree and Ora were out in the cold, and requested Mr. Hoyt's brother-in-law, James Thompson, who was then visiting him, to go and look for them. When Hembree reached Hoyt's house, he wore only an undershirt,

drawers, old shoes, a hat, and had a burlap hop sack placed over his shoulders. Complaining of his head, which was very warm, the defendant was permitted to repose on a lounge while his temples were bathed with cold water. After occupying the couch about an hour, he asserted that the noise caused by preparing the morning meal disturbed him, whereupon he was allowed to retire to a bedroom, where he slept until 7 o'clock in the morning, when he arose, and was given clothing and food. In the meantime Thompson, having gone to Hembree's farm, found the house wholly consumed, except a bed of coals about six feet square and three feet high on the ground in what had been the center of the main building. Being unable to find Mrs. Hembree or her daughter, he notified two neighbors of the fire, and they went to Hembree's farm, arriving at daylight, and found in the embers two human skeletons, which it is admitted were the remains of the defendant's wife and daughter. No vestiges of the heads of either was then to be seen, but it subsequently appeared that the chimney had fallen on parts of the remains, so that the bricks had to be removed in order to gather the bones for interment. About February 14, 1906, there were found in the ashes where the skeletons had been 16 natural teeth and one artificial tooth; the testimony showing that Mrs. Hembree used false teeth. Evidence was admitted, over objection and exception, relating to the finding in parts of a stove that had been in the house when it burned of what is claimed to be bones of a human skull and an artificial tooth, such alleged discovery having been made 10 and 64 days, respectively, after the fire. No direct evidence was offered tending to establish a criminal agency on the part of the defendant. The charge against him was undertaken to be established, however, by the following circumstances: (1) His sons were away from home when the house was burned; (2) the mass of embers which was first seen at the fire, it is maintained,

could not have been supplied from the material of which the building was composed; (3) when the skeletons were discovered, no skull bones were seen; (4) the finding in the broken parts of a stove of cranium bones and an artificial tooth. These alleged attendant conditions, and the testimony hereinafter specified from which a motive was inferred, constitute the basis on which the verdict and judgment rest.

The defendant's testimony is to the effect that his sons were permitted to leave home for a few days when their absence would not interfere with the pursuit of their studies at the public school, which had adjourned for the holidays; that in the early morning of December 29, 1905, he was sleeping in his undershirt and drawers in a bedroom over the kitchen in his house, when he awoke and found the chamber filled with smoke; that he immediately called his wife, who was lying at his side, and also aroused his daughter, who was sleeping in another upper bedroom; that Mrs. Hembree and Ora, without putting on other apparel than the nightgowns in which they had been reposing, went with him downstairs, each carrying bed clothing; that, on reaching the lower floor, he discovered under the stairway a fire which he tried to extinguish with a pail of water obtained from the kitchen; that he and his wife tried to carry into the house a tub of water which stood outside, but either the handle broke or Mrs. Hembree fell, for the tub was overturned and the water spilled; that the fire had then made such headway in the cloth and paper lining on the walls that it was found that the house could not be saved, whereupon some of the furniture in the sitting room was cast outside, when Ora suddenly exclaimed, "Mamma, my trunk; my fine clothes!" that, looking up the stairway towards the room in which his daughter's better garments were kept, he said to her: "Don't go up there. It is dangerous"—that he went to the kitchen and removed some provisions and dishes, and thence to the woodshed, where

he threw out a few things; that, when the heat compelled him to retire, he tried to find his wife and daughter, but being unable to do so, and thinking they might have gone to the home of Mr. Hoyt, he started to run in that direction; that he had previously been ruptured, and as the truss which he constantly wore had been left with his outer clothing in the bedroom which he had occupied, his bowels escaped from their natural cavity and protruded through the severed muscles, causing him intense pain, to relieve which he was obliged to place his hands against and to press down upon the afflicted parts; that in this condition he reached the home of Mr. Hoyt, dressed as hereinbefore mentioned; and that the pain continuing he was permitted to retire to a bedroom, where, the hernia having been reduced, his distress ceased, and he slept unconscious that his wife and daughter had perished in the flames. Furniture, provisions, dishes, clothing and the upset tub were found near where the walls of the house had stood. Lawson Hembree, explaining the finding in the parts of the stove of bones and an artificial tooth, testified that a few days after the fire he and his brother Roy went to the farm to care for stock, and at their father's request they searched in the ashes where the skeletons had been and found a handful of bones which had not been buried with the others, which pieces they threw in a heap to be placed in a grave, and left them near the broken parts of the sitting room stove. They thereafter tried to assemble the sections of the stove so as to make a fire, but after rolling on the ground the broken parts of the stove, they were found to be so warped by the heat that they could not be united. Lawson's testimony is corroborated by that of his brother, so far as it relates to the unsuccessful attempt to repair the stove.

The exception first hereinbefore noted relates to the admission of testimony, which the state maintains established the existence of improper relations between the

defendant and his daughter, and furnished the motive for the commission of the crime with which he was charged. The testimony so objected to, and which was received subject to the promise of the district attorney properly to connect it, consisted of the sworn declarations of M. S. Larsen, which are to the effect that for several years prior to the trial herein he had been engaged in conducting a hotel at Tillamook; that he was acquainted with the defendant, and in her lifetime also knew his daughter; that she attended a school at Tillamook about three months, during which time her father nearly every week brought her to the hotel to remain over night. Referring to such a visit made February 22, 1905, Larsen testified as follows: "He came into my house after supper time and asked for two rooms. I told him we would give him one on the third floor, No. 12, and the lady No. 11 on the second floor. * * He said: 'I will go across the street to Mr. Hadley's (meaning a saloon) and I will come back again.' He left the lamp burning. * * The lamp was left burning there, and he had not been in that room in the morning when I came there. * * He had been going to her room. Her door opened from the wrong side, and he had been there because of marks of his feet there. His daughter was in that room, and he had been going in there through the door, because he had left his dirt there, all right enough, and tobacco spit, all right enough." This witness, having stated that only one of the beds so assigned was used that night and that he could not say how many persons had occupied it, was asked:

"Was there anything to indicate?" and Larsen replied: "Yes."

"Q. What was it?

"A. Tobacco spit, and one thing and another.

"Q. State to the jury what it was.

"A. It was something on the sheet. I could not tell such things some time men leave in bed. You all know that."

Larsen further stated upon oath that in June, 1905, Hembree and his daughter again came to the hotel and were informed that no rooms could be given them. The witness was interrogated as follows:

"I will ask you what you finally did?

"He asked me if I would turn his innocent girl on the street on a rainy night. I said, 'No, I will give my own bed up and she can sleep with my wife.' He said, 'You can put her where you please.' My wife said she would rather not do that. She was an old lady. I told him I could find a room for her, but not for him."

The witness having stated that he gave Ora room No. 9, was directed as follows:

"Well, go ahead and state about the defendant's conduct.

"A. I took her to this room and she came back again and went into the parlor and sat down. After they have sat there and talked a little he got up and came into the sitting room and he told me: 'My daughter is ready for bed, and you can take her and I will go out in town and find another room.' He went across the street towards Hadley's saloon, and I took the girl to this room, No. 9. After he left the house, understand, it must have been an hour later and about 11 o'clock he came back again to the house and went down on the other side of the street, down to the corner and stood and looked, and he was walking up and down two or three times.

"Q. Go ahead, Mr. Larsen. You said you saw him walking up and down.

"A. By this time I turned down all the lamps in front and I was sitting inside. I went down on one side of the house, and I came upstairs and saw him standing down below. I went to see what was going on. I wanted to see a little more. I saw he was watching a window some place. I came upstairs, up to the third floor, got about half way up, and looked right down on the girl, and she lay spread out on the bed. I went upstairs on the third floor, and I looked down and I could see the girl. She was lying on the bed."

The court having adjourned for the day, Larsen's testimony was resumed the next morning, as follows:

"Q. You go ahead where you left off last evening and relate what occurred between the defendant, Hembree, and his daughter that night.

"A. At the time I say that I went back to the lower part?

"Q. What did you see?

"A. Well, I saw him out on the sidewalk, standing there looking up against the window. He was walking along on the other side, and he came up to the front window and put his hand up this way and looked in. There was no light in the house. I turned them down, and went back.

"Q. Went and looked into the front window from the sidewalk?

"A. Yes.

"Q. From the barroom where you sat?

"A. Yes. He came to the other corner at the back part of the house. I came out on the sidewalk, and saw him standing there. Then he came back again, and I came back and sat by the stove and he came up again on the street and looked in again.

"Q. What time was this?

"A. Eleven o'clock in the night. Then I heard him going in at the center door, going upstairs, and he was up two or three stairs at the time, and I stepped out into the hall where he was going upstairs, and I asked him: 'Where are you going?' and he said, 'I am going up to see my daughter.' I said, 'She is not up there.' He said, 'Where is she?' 'Didn't I tell you she was sleeping with my wife?' He said, 'Say, you must not think I am such a fool as that. I know where she is.' I asked him where she is, and he said: 'Room No. 9, right up there.' I said: 'I want you to get out and leave her alone.' He said: 'I have got to tell her something. I want to see her bad.' I said: 'If you have left anything, seal it up and I will pass it to her any time.' He said he could not do that. Then I said, 'You go out.' He said: 'If I can't stay in your house, I must go.' He went across the street to Hadley's saloon. I went back again to my bed, but 20 minutes after 2 he was back again.

"Q. Go ahead, and relate what took place.

"A. He was back again and I happened to hear him go in and stumble on the stairway, and before I could get

up, he had already turned upstairs. I saw something walking up there on the second floor. I walked up there and looked into the girl's room, and he was standing there in the trunk room. I asked him what he wanted, and then I said: 'I want you to go down, or I will throw you down.' I put my foot on his back, and he went downstairs. He landed half ways down and reached in his pocket for something. He turned around again and I sent him downstairs, and he landed on the floor. About 5 o'clock in the morning he was there again. He was lying against the wall alongside of her door. I called him down and he went off. I suppose he had already called the girl, for it was a short time afterward she came down, and they went away together. * *

"Q. You didn't make it plain to me a moment ago about the girl when she was in her room. How was she dressed?

"A. Didn't have anything on.

"Q. What was she doing at the window?

"A. I don't know; leaning up against the building.

"Q. Was the girl doing anything at the window?

"A. Yes.

"Q. What?

"A. Flapping the window curtains.

"Q. Where was he from the window curtain she was flapping?

"A. Standing on the sidewalk. She was lying there this way, with the light burning.

On cross-examination, in referring to the visit made to the hotel in June, 1905, Larsen testified that Hembree and his daughter arrived about 7:30 P. M., and in answer to the inquiry, "After that he went away?" the witness replied: "Yes, took the girl and went away; went to a school doings in town that evening." * *

"Q. When he went away, it was agreed she was to sleep with your wife?

"A. Yes. * *

"Q. Do you know what time it was when Mr. Hembree and his daughter came back to the hotel? * *

"A. Nine o'clock.

"Q. And then what did Mr. Hembree do at 9 a'clock?

"A. They went into the parlor and talked there for 5 or 10 minutes.

"Q. Two of them?

"A. Yes.

"Q. Were you in the parlor?

"A. No.

"Q. Anybody else?

"A. No."

Referring to the defendant's return to the hotel at 11 o'clock that night, Larsen in answer to the question, "Was Mr. Hembree drinking any?" replied, "Yes." On further cross-examination, and alluding to the visit to the hotel on February 22, 1905, after testifying that Hembree went away at 9 o'clock in the evening and two hours thereafter had not returned, when witness retired for the night, Larsen was asked: "Do you know that he came back at all?" He replied: "No."

"Q. Didn't see him come back?

"A. No. * *

"Q. Did you see him next morning?

"A. Yes.

"Q. What hour?

"A. About 5 o'clock. * *

"Q. Where did you see him at 5 o'clock?

"A. Coming down from upstairs.

"Q. Did you say that you saw him lying up against the wall?

"A. He had been lying up against the wall; tobacco spit all around there.

"Q. How do you know?

"A. Tobacco spit and the marks of his arms on the wall.

"Q. Marks of his arms on the wall?

"A. Yes.

"Q. What kind?

"A. Wet and dirty.

"Q. You didn't see him lying up against the wall?

"A. No.

"Q. You saw him coming down?

"A. Yes.

"Q. Drunk?

"A. Not very. He was always drunk.

"Q. Was he pretty full?

"A. Yes. * *

"Q. Raining that night?

"A. It was."

The defendant, as a witness in his own behalf, denied that he had been guilty of any improper conduct toward or with his daughter on February 22, 1905, or at any other time. He admitted, however, that in June of that year, when his daughter remained over night at the hotel, he gave his money to her to prevent him from squandering it for drink, but that, after she had retired, he went to her room and secured several dollars from her with which to purchase liquor. He is corroborated in this particular by the testimony of three men, who severally stated upon oath that at night, some time in the summer of 1905, they taunted Hembree as to his inability to obtain alcoholic beverage in Tillamook, which had been voted "dry" at a local option election; that the defendant, replying that he would show them that he could procure intoxicating drinks, immediately went to Larsen's hotel, which they saw him enter, and, after having been gone but a few minutes, he returned with some money, which he exhibited to them, and that, again leaving them, he soon came back with a bottle of liquor. That the purpose of visiting Ora's room was as indicated seems to find support in Larsen's testimony that, when he saw Hembree on the stairway, the latter said: "I am going up to see my daughter. I have got to tell her something. I want to see her bad"—declarations which the defendant would probably not have publicly made if he had contemplated the commission of a crime.

1. It is argued by defendant's counsel that Larsen's testimony does not prove that any improper relations existed between Hembree and Ora, and that the jury were incorrectly permitted to infer from such sworn declarations that the crime of incest had been committed by the defendant and his daughter; that from such deduc-

tion they were illegally allowed to infer that Mrs. Hembree had obtained knowledge thereof, and based thereon they were further permitted to infer a motive for the commission of the alleged crime. Proof of the commission of other offenses having no connection with the crime for which a defendant is on trial is irrelevant and inadmissible; but in order to establish the intent with which an accused performed a criminal act, or to ascertain a motive for such conduct, the prosecution may show other crimes committed by him, leading to or connected with the offense for which he is being tried: *Kerr*, Homicide, § 426; *Underhill*, Crim. Ev. § 90; *State v. O'Donnell*, 36 Or. 222 (61 Pac. 892); *State v. Martin*, 47 Or. 282 (83 Pac. 849).

2. The existence in every case of a motive for the commission of a crime is not indispensable to a conviction therefor: 8 Am. & Eng. Enc. Law (2 ed.), 290; *People v. Owens*, 132 Cal. 469 (64 Pac. 770); *State v. Rathbun*, 74 Conn. 524 (51 Atl. 540); though in *People v. Wood*, 3 Parker, Cr. R. (N. Y.) 681, 683, in referring to a conviction for the crime of murder, Mr. Justice JOHNSON remarks: "The case being one of circumstantial evidence wholly, proof of the existence of a criminal motive in the mind of the prisoner to commit the act was essential to making out a case against him which would justify a verdict of guilty." In *People v. Durrant*, 116 Cal. 179, 208 (48 Pac. 75, 82) it is said: "Where the perpetration of a crime has been brought home to a defendant, the motive for its commission becomes unimportant. Evidence of motive is sometimes of assistance in removing doubt and completing proof which might otherwise be unsatisfactory, and that motive may be shown by positive evidence, or gleaned from the facts and surroundings of the act."

3. Evidence showing that a party charged with a crime had a motive for committing it is not requisite, though such proof is of great importance in cases depending on

circumstantial evidence: *Preston v. State*, 8 Tex. App. 30. Thus in *People v. Stout*, 4 Parker, Cr. R. (N. Y.) 71, 128, the defendant and his sister were indicted for the murder of her husband and, the evidence of the criminal agency being circumstantial, testimony was received over exception of an incestuous relation existing between the accused parties during a few months immediately preceding the homicide, and it was ruled that no error was thereby committed. In that case the perpetration of the crime of incest by the accused parties and the knowledge thereof by the husband were facts legally established from which the inference of a motive was deduced. In *People v. Bennett*, 49 N. Y. 137, 149, it was held that an inducement tempting the mind to commit a crime could not be assumed, but that the fact from which the incentive was deduced must be established; the court saying: "It is in cases of proof by circumstantial evidence that the motive often becomes not only material, but controlling, and in such cases the facts from which it may be inferred must be proved. It cannot be imagined any more than any other circumstance in the case." So, too, in *People v. Fitzgerald*, 156 N. Y. 253, 258 (50 N. E. 846, 847), it is said: "In attempting to prove a fact by circumstantial evidence there are certain rules to be observed that reason and experience have found essential to the discovery of truth and the protection of innocence. The circumstances themselves must be established by direct proof and not left to rest upon inferences." That an inference may be based on an inference is maintained by reputable authors (see Will's Cir. Ev. (Beer's Am. Notes), 18g; Wigmore, Ev. § 41). In *Hinshaw v. State*, 147 Ind. 334, 363 (47 N. E. 157, 166), in commenting on subsidiary facts tending to support a judgment of conviction rendered against the plaintiff in error for the alleged killing of his wife, Mr. Justice MCCABE says: "This process of tallying and confirming each circumstance by the others does not infringe

the general rule that one inference cannot be based on another. There is an important exception to that rule, however. A fact in the nature of an inference may itself be taken as the basis of a new inference, whether intermediate or final, provided the first inference has the required basis of a proved fact"—citing in support of the exception Burrill, Cir. Ev. p. 138; Best, Pres. § 187; Greenleaf's Ev. § 34. The exception thus referred to is a literal quotation from the first text-book cited, except that the word "again," with which the sentence begins, has been omitted from the opinion. The paragraph from which the excerpt was thus taken concludes with the following statement: "And the right to draw one inference from another has in some instances been denied." The legal principle last quoted finds support in a text-book, the author of which, commenting on several decisions, remarks: "The cases afford many instances of evidence held admissable as affecting the probabilities concerning the principal question. But this proposition finds its limitation in the further proposition that an inference cannot be based on an inference": Gillett, Ind. & Col. Ev. § 51. To the same effect is 3 Enc. Ev. p. 70. Our statute, defining a species of indirect evidence and prescribing when that class is admissable, contains the following provisions: "An inference is a deduction which the reason of the jury makes from facts proved, without an express direction of law to that effect": Section 783, B. & C. Comp. "An inference must be founded (1) on a fact legally proved; and (2) on such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature": Section 785, B. & C. Comp. The law thus set forth was enacted in 1862, at a time when the rule announced by Gillett and as reiterated in the Encyclopedia of Evidence, to which reference has been made, was probably controll-

ing. But, however this may be, the statutory requirement that an inference "must be founded on a fact legally proved" necessarily excludes the more modern doctrine of predicating an inference on an inference.

4. It will be remembered that in alluding to a visit made to the hotel February 22, 1905, Larsen testified that the defendant had been going to his daughter's room. This emphatic declaration was immediately qualified and its effect weakened by the sworn statement of the witness showing that his conclusion is not founded on seeing Hembree enter her apartment, or observing him therein, or noticing him depart therefrom; but the decision is predicated on finding the next morning that the bed assigned to him had not been disturbed, and that the lamp which had been lit to illuminate his room the night before was still burning, and by discovering tobacco spit, marks of the defendant's feet, and the soiled sheet on Ora's bed. It will be borne in mind that on cross-examination Larsen testified that he did not know that Hembree came back to the hotel that night, but at 5 o'clock the next morning the witness saw him coming downstairs, and observed tobacco spit all around and marks of his arms on the wall, probably evidencing the place where the defendant, after returning at a late hour from the saloon, had slept during his inebriation and while resting against the wall. If by Larsen's reference to the "dirt" which he asserts Hembree left in his daughter's room the witness meant to imply that he discovered semen, such substance will not be presumed from the appearance of a mere whitish liquid on or a starchy condition of the sheet, but that the assumed pollution contained spermatozoa as its essential constituent should have been established by competent evidence (Burrill, Cir. Ev. 137), which apparently was not offered. So, too, the possibility of the alleged contamination from any other source than from the defendant should have been negatived, which was not done.

5. Larsen's direct and cross-examination is to the effect that in June, 1905, Hembree and his daughter having returned from a school entertainment about 9 o'clock at night, the witness took Ora to room No. 9, from which she came to the parlor, where she remained with her father five or ten minutes, no other persons being present. If she possessed a libidinous impulse, of which there is not a particle of evidence in the transcript aside from the implication to be gathered from Larsen's testimony, it would seem improbable that after retiring she flapped the curtains in order to attract her father's attention, when she knew before he left the hotel that room No. 9 had been set apart for her accommodation, and she probably told her father while they were together in the parlor what apartment she was to occupy during the night. It is fairer to infer from her deshabelle and the waving of the window shades, as observed by Larsen when he looked into her room, that the disrobing and the vibration were the means taken to mitigate the high degree of temperature, which at that season of the year was reasonably to be expected in this latitude, rather than to assign to her conduct an unchaste desire. The relationship which existed between Hembree and his daughter excludes the presumption of any improper relation with each other from their mere intimate association, and, before an inference of their criminality could have been deduced, a much greater degree of proof was required than if the family tie had not existed.

6. The witness, Larsen, seems to have deduced the inference of incestuous adultery from the circumstances which he related, and on such conclusion the jury were permitted, over objection and exception, to base other inferences, unmindful of the statutory requirement that the basic fact, the illicit intercourse, should have been legally proved before a motive for the commission of the alleged homicide could have been inferred, even to bring the case within the exception noted in *Hinshaw v. State*,

147 Ind. 334, 363 (47 N. E. 157, 166). As the fact of incest was not established, Larsen's testimony was not connected, and an error was committed in receiving his sworn statements, in consequence of which the judgment is reversed and a new trial ordered. REVERSED.

Mr. Justice MCBRIDE, having tried the action wherein the defendant was charged with killing his daughter, took no part herein.

Argued May 8, decided July 20, rehearing denied October 5, 1909.

PATTON v. WASHINGTON.

[108 Pac. 60.]

INSANE PERSONS—AVOIDANCE OF TRANSFERS OF PERSONAL PROPERTY.

1. A person who, when insane, delivered personal property to another, who knew of the insanity shortly afterwards, may, on being restored to sanity, demand and receive a return of the property.

PLEDGES—EVIDENCE AS TO CHARACTER OF TRANSACTION—BURDEN OF PROOF.

2. One admitting that another is the owner of personal property, but insisting that it is subject to a pledge to him for pre-existing debt, has the burden of proving the debt and pledge.

PLEDGES—TRANSFERS OF PERSONAL PROPERTY—OBLIGATION OF TRANSFEREE.

3. One receiving personal property from an insane person and learning of the insanity must take ordinary care of the property with a view of returning it on the latter being restored to sanity.

APPEAL AND ERROR—FINDINGS—CONCLUSIVENESS.

4. A finding of the trial judge on conflicting testimony will not be disturbed on appeal.

From Umatilla: HENRY J. BEAN, Judge.

Statement by MR. JUSTICE MCBRIDE.

This is a suit by Mark Patton against James H. Washington in the nature of a cross-bill to an action at law arising out of the following facts: Defendant brought an action in replevin against plaintiff to recover a diamond ring and stud, which he claimed as his property. Thereupon plaintiff brought the present suit to restrain the prosecution of the law action, and alleged: That about October 15, 1901, defendant was the owner of the diamond ring and stud; that at said date he gave and de-

livered the stud to plaintiff; that at the time of such delivery defendant was indebted to plaintiff in the sum of \$199.60, and interest thereon, for money loaned and paid out for defendant, and for goods, wares and merchandise furnished him at his request; that plaintiff did not accept the diamond stud as a gift, but only as a pledge, for the purpose of securing the payment of defendant's indebtedness; that, at about the same date, defendant gave and delivered to Ralph Wade the diamond ring before mentioned; that Wade accepted the same as a gift; that thereafter Wade, being desirous of returning the ring to defendant, voluntarily delivered it to plaintiff, and plaintiff accepted it from Wade as a further pledge to secure said indebtedness of defendant; that on or about December 20, 1901, without any fault or negligence on the part of plaintiff, the stud was stolen from him, and he has been unable to recover it; that, ever since Wade gave and delivered the diamond ring to him, he has retained the same, and now retains it as a pledge for the payment of such indebtedness. The complaint then gives an itemized statement of defendant's alleged indebtedness, alleges the pending of the action at law, and that there is no understanding or contract between plaintiff and defendant whereby plaintiff is authorized to sell and dispose of the diamond, so that the proceeds may be applied on the indebtedness. Plaintiff then prays for a decree for the sum which he claims to be due from defendant, with interest, that the ring in his possession be declared a pledge to secure payment of the same, that it be sold to satisfy plaintiff's claim and costs, and that the action at law be enjoined.

Defendant's answer admits his ownership of the diamond, denies that he ever gave the stud to plaintiff, but alleges that it was delivered to him for the use and benefit of defendant; denies that he ever gave Wade the ring, but alleges that it was delivered to him for the use and benefit of defendant; denies that the diamonds are only

worth \$320, but alleges that they are worth \$520, and denies every other allegation of the complaint. The court below found: That defendant was the owner of the diamonds; that he was indebted to plaintiff in the sum of \$41; that the value of the ring was \$175, and the stud of the value of \$250; that plaintiff at the commencement of the suit was unlawfully detaining the same from defendant; that he had lost the stud; that defendant was entitled to a decree for its value, less the sum of \$41, and that the ring be delivered to defendant. A decree was rendered accordingly, from which decree plaintiff appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Robert J. Slater*.

For respondent there was a brief and an oral argument by *Mr. D. W. Bailey*.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

1. A full discussion of the evidence in this case would be of no interest to any one, except the immediate parties to the case, and of no benefit to them. We are satisfied from the evidence that the defendant was insane when he gave his diamonds to plaintiff and Wade, and that if the plaintiff was not aware of that fact at the time, he knew it a short time afterwards. This being so, defendant had a right, on returning to his reason, to demand and receive a return of his property. Perhaps, if he owed plaintiff the gift might be treated equitably as a pledge, though, as a pledge grows out of either an express or implied contract, it is difficult to see how an insane person could hypothecate anything.

2. Plaintiff, in his complaint, elects to treat defendant as the owner of the property, subject to a pledge to him for a pre-existing debt, and the burden of proof is upon him to show the debt and the pledge. The existence of

the debt, except a small balance for cigars, amounting to \$41, rests entirely upon his own testimony, which is flatly contradicted by that of the defendant. His testimony in regard to the diamond delivered to him by Wade is disputed by Wade, who appears to be entirely disinterested in the matter, and, except as to the \$41 for cigars, he has failed to show, by the preponderance of evidence, that defendant owed him anything.

3. The evidence shows that he took the stud home and gave it to his wife, and that it was so negligently kept that it was lost or stolen while in her possession. When he learned that the jewels were the property of an insane man, it was his duty to take ordinary care of them, with a view of returning the same when defendant's reason was restored, rendering it practicable for him to do so. This the court below must have found that he failed to do, and we think properly.

4. The court below had all the witnesses before it, except Wade, and was much better qualified to judge the value of their testimony than we are, and, in a case like this, where the evidence is contradictory, we feel unwilling to disturb its findings. We do not question the propositions of law laid down by counsel for plaintiff; but upon the pleadings and the facts we think the decree of the lower court was correct.

The decree is affirmed.

AFFIRMED.

Argued July 20, decided August 10, rehearing denied October 5, 1909.

STATE v. FINCH.

[108 Pac. 506.]

CRIMINAL LAW—TRIAL—TIME TO PREPARE.

1. Where a coroner's inquest was held shortly after the killing, at which accused's principal counsel was present, and several counsel, who represented accused on his final trial, were present at the preliminary examination, which was held a week after the killing, the court did not err in compelling accused to go to trial within eight days after the finding of the indictment, on the theory that his counsel had had insufficient time to prepare, though they had not been formally retained until after the indictment was found.

CRIMINAL LAW—CONTINUANCE—ABSENCE OF WITNESSES

2. The testimony of one of defendant's absent witnesses, for whom a continuance was asked, was taken by deposition, by consent of the State, and the affidavit stated that the other had left the State, and would not return under six weeks, but did not state the probable time of his return. Though the case was set for December 18, 1908, no subpoena was issued for the witness until on the 16th, leaving a delay unaccounted for of five or six days, nor did the application show the relevancy of the absent testimony to defendant's supposed defense. *Held*, that the denial of the application was not an abuse of discretion.

CRIMINAL LAW—CONTINUANCE—DENIAL—DISCRETION—AFFIDAVITS—BILL OF EXCEPTIONS.

3. Refusal of an application for a continuance will not be disturbed on appeal, except for abuse of discretion. Affidavits for continuance cannot be considered on appeal, unless made a part of the record by the bill of exceptions.

CRIMINAL LAW—EVIDENCE—OTHER OFFENSES—MOTIVE.

4. Where the defendant's act in killing deceased arose from the persistence of deceased's prosecution of defendant, resulting in his suspension from practice as an attorney, the record showing the charges preferred by deceased as prosecutor for the State Bar Association against defendant, accusing him of drunkenness while trying a case in court, the issuance of checks on a bank where he had no funds, and of unlawfully affixing a notarial seal to certain pension papers, etc., was competent as evidence of motive, though it showed defendant was guilty of other offenses.

CRIMINAL LAW—APPEAL—RIGHT TO ALLEGE ERROR.

5. Accused was not entitled to claim that the introduction of the record of his prosecution by deceased, for conduct unbecoming an attorney, which was the cause of the killing, was error, where he himself introduced the record of the preliminary hearing of the same charges before the grievance committee of the Bar Association, which was substantially the same as the record introduced by the State.

HOMICIDE—MOTIVE—EVIDENCE.

6. Where, in a prosecution for homicide, the court permitted evidence of a prosecution of defendant by deceased, for conduct unbecoming an attorney, to show motive for the killing, the truth of the charges in such proceeding was not in issue, and the court properly refused to permit defendant to go into the merits thereof.

CRIMINAL LAW—EVIDENCE—LOCUS IN QUO—PLAT.

7. In a prosecution for homicide, a plat of decedent's office, drawn to a scale by an expert, and shown by his testimony to be a generally fair and accurate representation of the *locus in quo* shortly after the homicide, was admissible, not as substantive evidence, but to aid in understanding the testimony.

CRIMINAL LAW—EVIDENCE—PHOTOGRAPH OF DECEASED.

8. Where the physician who performed the autopsy was not personally acquainted with deceased, the court properly permitted a photograph, proven to be a correct likeness of deceased, taken in health, to be introduced to identify the body of the person on whom the autopsy was performed as that of deceased.

CRIMINAL LAW—PAROL EVIDENCE.

9. Where defendant killed deceased because of the latter's zeal in prosecuting charges against defendant for disbarment, and it did not appear that

deceased's appointment as prosecutor for the Bar Association was other than oral, or that it had records of any kind, the fact that deceased was prosecutor for the association was provable by parol.

CRIMINAL LAW—STATEMENTS OF COUNSEL.

10. That special counsel for the State, in the course of an argument to the court, said that defendant "shot Fisher down" was not error; the court having promptly directed the jury to disregard the language.

WITNESSES—CROSS-EXAMINATION—BIAS.

11. Where witness for defendant, who was confined in jail when defendant was received, accused of killing deceased, testified to bruises and contusions on defendant's face and head when he first entered the jail, and that there was a hole or cut in defendant's hat, to corroborate defendant's theory that deceased had struck him on the head with a seal, and that the shooting was in self-defense, the State was properly allowed to ask the witness on cross-examination if he had not, in a conversation with a newspaper reporter, requested the reporter to visit deceased's office, and ascertain if there was a seal there, and, if so, to examine as to whether there was dust on it, etc., as tending to show bias.

CRIMINAL LAW—APPEAL—HARMLESS ERROR.

12. Section 856, B. & C. Comp., provides that the judge himself, or any juror, may be called as a witness by either party, but in the former case it is within the discretion of the court or judge to order the trial to be postponed or suspended, and to take place before another judge. Held that, where in a prosecution for homicide a juror was called from the box, and the judge from the bench, by defendants to testify concerning trifling and inconsequential matters, the fact that the judge did not suspend the trial and direct it to be continued before another judge, while he was testifying, and that only eleven jurors were in the box while the juror was testifying, was immaterial.

HOMICIDE—SELF-DEFENSE—INSTRUCTIONS.

13. An instruction that, unless defendant's fear of great bodily harm, or great danger to his life, was such that a reasonably prudent man would have entertained under all the circumstances, then his act in striking the fatal blow was not justifiable or excusable, properly stated the law.

CRIMINAL LAW—INSTRUCTIONS—POLLING JURY.

14. Where the bill of exceptions showed that all the jurors were present at the convening of court, and trial was not at any time allowed to proceed without all the jurors, the defendant and his counsel being present, and that all the jury were present when the instructions were given, an objection that the jury was not polled before the court gave its instructions was frivolous.

GRAND JURY—RIGHT TO IMPANEL—INDICTMENT.

15. Where the court ordered a grand jury to be regularly drawn, and accused was indicted thereby, it was not material whether the constitutional amendment of June 1, 1908, providing that thereafter no person should be charged in the circuit court with any crime except by indictment by grand jury, was then in force, since the statute previously existing, and permitting the commencement of a criminal action by information, also permitted the court in its discretion to call a grand jury.

CRIMINAL LAW—RIGHT TO COMPETENT COUNSEL.

16. Where defendant himself was a lawyer of several years' standing, and his partner had been a practicing attorney of the Supreme Court for a number of years, and in addition he had the services of a former district attorney and two other lawyers, who both exhibited knowledge of law and experience in criminal trials, an objection that he was not represented by competent counsel was unsustainable.

HOMICIDE—CAPITAL PUNISHMENT—CONSTITUTIONAL PROVISIONS.

17. Section 15, Article I, Constitution of Oregon, declaring that laws for the punishment of crime shall be founded on principles of reformation, and not vindictive justice, when construed with Section 11, Article V, authorizing the Governor to grant reprieves, which are applicable only in capital cases, does not impliedly prohibit the infliction of the death penalty as punishment for murder in the first degree.

PAEDON—"REPRIEVE."

18. A "reprieve" is a respite by the Governor from a sentence of death.

HOMICIDE—CRIMINAL LAW—PRESUMPTION—CAPITAL PUNISHMENT.

19. Where a constitutional provision has been copied from the constitution of another state, after it has been construed by the courts of that state, it will be presumed to have been adopted with the construction placed upon it by the courts of the state where it originated, and it must be regarded as settled in this State that the legislature derives authority from the constitution to enact laws for the infliction of punishment by death, in proper cases.

From Multnomah: EARL C. BRONAUGH, Judge.

The defendant, J. A. Finch, was indicted by the grand jury of Multnomah County for murder in the first degree, in the killing of one Ralph D. Fisher. A trial resulted in his conviction as charged and, having been sentenced to death, he appealed.

AFFIRMED.

For appellant there was a brief over the names of *Mr. John A. Jeffrey*, *Mr. Charles E. Lenon*, and *Mr. C. A. Ambrose*, with oral arguments by *Mr. Jeffrey* and *Mr. Lenon*.

For the State there was a brief over the names of *Mr. Andrew M. Crawford*, Attorney General, *Mr. George J. Cameron*, District Attorney, and *Mr. John J. Fitzgerald*, Deputy District Attorney, with oral arguments by *Mr. Fitzgerald* and *Mr. Arthur C. Spencer*.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

The assignments of error in this case being more fully stated in the reply brief filed by defendant's counsel, we will consider them in the order in which they are therein set forth.

1. The first assignment is that the court erred in compelling the defendant to go to trial within eight days from the finding of the indictment. The killing of Fisher

and consequent arrest of defendant, occurred on the 28th day of November, 1908. A short time subsequent to this the coroner's inquest was held, and the principal counsel for defendant was present. It also appears that several of the counsel who represented defendant on the final trial were present at the preliminary examination, which was held a week after the killing, so that, while it may have been true that counsel had not been formally retained until defendant was indicted, it is evident that they had been active theretofore in the case and had every opportunity to become familiar with it, and the manner in which they conducted the defense showed that such opportunity had not been neglected.

2. The question of granting a continuance on the ground of the absence of material witnesses was one addressed to the sound discretion of the trial court. It appears that the witnesses desired by defendant were all actually present at the trial except two, Mrs. May Finch and C. H. Piggott, and that the testimony of Mrs. Finch was taken by deposition by consent of the State, leaving Piggott the only witness whose testimony was not available on the trial. Mrs. Finch and the defendant both testified to the same state of facts which the defense claimed could be established by Piggott's testimony, and they were not contradicted by any witness. The affidavit for continuance did not indicate clearly the probable time of Piggott's return to the State, merely stating that he had gone to California and would not return under six weeks, but not indicating whether or not he was likely to return after that period. It also showed that, although the trial had been set for the 18th day of December, no subpoena had been issued until the 16th, thus showing that five or six days had been wasted before any subpoena had been issued. The affidavit did not show the relation of the testimony of Piggott to the proposed defense, or that it had any relevancy to it whatever. In the light of the testimony subsequently adduced and the defense made

it can now be seen that the desired testimony would have been relevant, but the court could not know this before the trial, unless the affidavit set forth enough of the theory of the defense to enable the court to judge from the affidavit itself as to the probable materiality of the testimony. The further statement in the affidavit as to the excited state of the public mind and prejudice against defendant, by reason of inflammatory articles and cartoons in the newspapers, were matters of which the court below was in a much better position to judge than we are. None of the alleged articles or cartoons are attached to the affidavits, so that neither this court, nor the court below is able to say from actual inspection of them whether or not they were of such a character as to greatly influence public opinion, or prejudice a jury against the defendant. The fact that no exception is taken to any ruling of the court upon the acceptance or rejection of any juror indicates that a jury believed by both parties to have been fair and impartial was secured in the case.

3. The granting or refusing of a motion for continuance is a matter in the discretion of the trial court, and will not be disturbed on appeal, except for an abuse of that discretion: 4 Enc. Pl. & Pr. 835; *State v. O'Neil*, 13 Or. 183 (9 Pac. 284); *State v. Howe*, 27 Or. 138 (44 Pac. 672); *State v. Huffman*, 39 Or. 48 (63 Pac. 1). We are unable to see any abuse of discretion in the action of the court below. While we have treated this assignment as though it had been regularly before us, as a matter of strict practice it is not. The affidavits for continuance are not made a part of the bill of exceptions, but merely come here with the transcript. This court has held that, if review of the decision on a motion refusing a continuance is desired here, the affidavits must be made part of the bill of exceptions: *State v. Kline*, 50 Or. 426 (93 Pac. 237).

4. The next assignment of error relates to the ruling of the court permitting the introduction of the record of certain disbarment proceedings against defendant in the Supreme Court. The prosecution offered a record showing certain charges preferred by deceased as prosecutor for the State Bar Association against defendant, accusing him, among other things, of drunkenness while trying a case in court; of issuing checks upon a bank wherein he had no funds; and of unlawfully affixing a notarial seal to certain pension papers; and also offered defendant's answer thereto, his plea and the final judgment of the court suspending him from practice. This record was admitted, over defendant's objection as to its competency and materiality, coupled with a specific objection that it tended to prove the bad character of defendant, and to show that he had been guilty of other offenses than the one for which he was on trial, and was therefore highly prejudicial. It is plain from the evidence that the difficulty between defendant and deceased arose out of the disbarment proceedings prosecuted by deceased against defendant. The theory of the State was that defendant, being incensed at the prominent part deceased had taken in preferring charges of professional misconduct and dishonesty against him, in prosecuting them to final judgment, and thereafter refusing to sign a petition for his reinstatement as an attorney, sought him out and killed him as a matter of revenge; in other words, that these acts of the deceased and their results to defendant furnished the motive which actuated defendant to perpetrate the fatal act.

5. Evidence of motive, while not absolutely essential, is always admissible in prosecutions for murder. "When the *corpus delicti* has been proved in a prosecution for homicide, and the circumstances indicate that the accused was the perpetrator of the homicide, facts tending, even though remotely, to show a motive are admissible against him, though the jury should exercise great cau-

tion in such proof. And all evidence of whatsoever nature tending to throw light upon the relations existing between the accused and the deceased and the feeling between them is competent; the remoteness of the evidence of motive going to its weight, and not its admissibility. Though not necessary to the existence of malice in homicide, motive is frequently a constituent element of it, and the presence or absence of motive is always a subject of proof as a means of establishing the presence or absence of malice": Wharton, Homicide (3 ed.), 595. Defendant's counsel, while admitting this general proposition, contends that such proof cannot go to the extent of showing that defendant has been guilty of committing other offenses, but in this contention he is not borne out by the authorities. "Proof of the commission of another crime may be given when it tends to show motive for the homicide in question": Wharton, Homicide, § 596. Evidence of this character has been frequently admitted where the claim of the State was that the homicide had been committed in revenge, on account of ill feeling growing out of litigation or criminal prosecutions: *State v. Geddes*, 22 Mont. 68 (55 Pac. 919); *State v. Bodie*, 33 S. C. 117 (11 S. E. 624); *State v. Welch*, 22 Mont. 92 (55 Pac. 927); *Butler v. State*, 91 Ga. 161 (16 S. E. 984); *Gillum v. State*, 62 Miss. 547. In all of the above-cited cases the record was admitted in evidence, the same as was done in the case at bar.

In the case of *State v. Bodie*, 33 S. C. 117 (11 S. E. 624), the record introduced consisted of an affidavit, filed by deceased for the arrest of the defendant, the warrant of arrest issued thereon, the testimony of the State's witnesses, the recognizance given by the defendant, the indictment found in the trial court and the *nolle prosequi* thereof by the district attorney. The Supreme Court of South Carolina held all these competent, except the testimony of the State's witnesses. In *Butler v. State*, 91 Ga. 161 (16 S. E. 984), a warrant charging defendant with

adultery, and his recognizance under it, were held to be competent as showing motive for killing the deceased, who had procured such warrant to be issued. In *State v. Geddes*, 22 Mont. 68 (55 Pac. 919), an information was introduced in evidence charging defendant with an assault upon deceased, and also a complaint in a civil action by deceased against the defendant growing out of the assault. Both these were held competent evidence, as tending to show the state of feeling between the parties, and therefore a motive for the killing. Authorities on this subject might be multiplied, but further citations are needless. It is apparent from the evidence that the deceased, both before the grievance committee of the Bar Association and the Supreme Court, had vigorously prosecuted defendant for misconduct as an attorney; that he had filed accusations against him that, whether true or false, would have had a tendency to cause ill feeling against him on the part of the defendant; that he had followed these up to a final judgment of suspension from practice. The record was competent evidence to prove this, though it is possible that some portions of it could also have been proved by parol. It is true that the tendency of such evidence may have been to show that defendant had been guilty of other offenses than murder, but evidence, otherwise relevant, should not be excluded merely because the effect of it may be to show that the party on trial has multiplied his crimes. The judge presiding at the trial very impressively admonished the jury that the evidence was not admitted for the purpose of showing the bad character of the defendant, but solely for the purpose of showing motive, and that they were to consider it for that purpose only. This admonition was twice given during the trial, and again repeated in the charge, and every effort possible was made to confine the effect of the evidence to the purposes for which it was admitted. In addition to the fact that the evidence above adverted to was entirely

competent, the defendant introduced the record of the preliminary hearing of these same charges before the grievance committee of the Bar Association, which was substantially identical with the record introduced by the State and commented upon and explained it at great length. Even if the introduction of the first record had been error, which it was not, the introduction by defendant of this second record, which the bill of exceptions shows to have been practically a duplicate of the first, would have cured it.

6. The next assignment relates to the alleged refusal of the court to allow defendant to explain the record in the disbarment proceedings, and to discuss the merits of the charges against him after the record had been received in evidence. The truth of the charges filed was not a matter in issue. Had they been utterly false their effect to inflame the defendant's mind would probably have been as great, or greater, than if they had been true. The record was not introduced for the purpose of showing that defendant was a man of bad character, but for the purpose of showing the feeling and general relations of defendant with deceased; and, their truth or falsity not being material, the court might perhaps have been justified in refusing to allow testimony on that subject. But while the court at one stage of the case refused to allow defendant to go into explanations in regard to the charges, later on it did permit him to do so, and to explain how he came to draw the checks mentioned in one of the charges, and to call Snyder, one of the firm who cashed the alleged fraudulent checks, who testified as to everything that he personally knew about the transaction.

7. There was no error in allowing the plats of Fisher's office to be introduced in evidence. They were offered, not as substantive testimony as to any fact, but to enable the witnesses to point out more clearly the location of the desk, chairs, safe and doors, and thereby to give

the jury a general idea of the situation. They were drawn to a scale by an expert and shown by his testimony to be a generally fair and accurate representation of the *locus in quo* shortly after the homicide. Other witnesses testified as to their substantial correctness as showing the situation at the time of the homicide, and out of many witnesses, both for the State and the defendant, who referred to the maps in the course of their testimony, the only criticism that we now recall was that of one witness, who thought the location of Fisher's desk might be a few inches out of the way.

8. Another assignment is that the court erred in allowing a photograph of deceased to be introduced in evidence. The physician who performed the autopsy was not personally acquainted with deceased, and only knew that he had performed an autopsy on the body of some person unknown to him. A photograph of deceased, proven to be a correct likeness, was shown him, and he then testified that the person upon whom he performed the autopsy was the same person represented in the photograph. For the same purpose of identification the photograph was also shown to other witnesses. It was a picture showing deceased in health and strength, and was not in any way calculated to excite the passions or sympathy of the jury. In *State v. Miller*, 43 Or. 325 (74 Pac. 658), a photograph showing a number of gunshot wounds on the body of the deceased and presenting what the court calls "a grewsome spectacle," was introduced without any apparent necessity, and without proof of its correctness. The court held that under the circumstances its introduction tended unnecessarily to inflame the jury against defendant and that its admission was error. But in this case the purpose for which the picture was introduced was proper, and there was nothing in any way calculated to prejudice defendant's case in exhibiting it to the jury.

9. The next assignment is in relation to the ruling of the court admitting in evidence an attempt to disbar defendant in another proceeding that had been dismissed. The remark heretofore made in relation to the record from the Supreme Court will apply also to this proceeding. Deceased had been connected with it, and it was therefore admissible for the same reason that the other record was admissible. Another assignment predicates error upon the ruling of the court admitting oral testimony showing that deceased was the prosecutor for the State Bar Association. There is nothing in the record showing that his appointment was other than oral, or indicating that the association has any records of any kind. The objection is not tenable.

10. Another assignment alleges that the court erred in allowing the special prosecutor to say that defendant "shot Fisher down." The answer to this is that the court did not "allow" the prosecutor to say the words imputed to him. It appears from the bill of exceptions that the words were uttered in the course of an argument to the court; and, when defendant's counsel objected, the court promptly directed the jury to disregard the language.

11. Another assignment challenges the ruling of the court in allowing the prosecution to cross-examine Martin, a witness for the defense, in regard to a conversation between himself and Smith, a reporter for the Daily Journal. Martin, who was confined in the jail when defendant was received there, testified to certain bruises and contusions, which he claimed were upon defendant's face and head when he first entered the jail; and also testified that there was a hole or cut in defendant's hat; the evident object of the testimony being to corroborate the theory of defendant that Fisher had struck him on the head with a seal, and that the shooting was in self-defense. To show Martin's bias and interest in the case, and his active partisanship therein on behalf of the defendant, the State asked him on cross-examination if

he had not requested the reporter to visit Fisher's office and ascertain if there was a seal there, and, if so, to examine as to whether there was any dust on it, and other matters along the same line of inquiry. Acts or conversations with third parties tending to show active interest and partisanship on the part of a witness in favor of the party for whom he is called, are always admissible as tending to show bias, and therefore going to the weight and credibility of his testimony. The evidence was properly admitted.

12. The next assignment predicates error upon the fact that one of the jurors was called as a witness, leaving, as the counsel puts it, "only 11 jurors in the box," and that the judge was called as a witness and testified "with no judge on the bench." Both the juror and the judge were called by the defendant, and both of them upon such trifling and inconsequential matters as to leave the impression that counsel, in their zeal for their client, were seeking to get an error into the record, with a view of taking advantage of it afterwards. Criminals would find an easy method of evading justice if the law were so farcically technical that the trial could be brought to a standstill and a retrial obtained by the simple expedient of calling a juror as a witness. Fortunately our laws provide for just such an exigency (Section 856, B. & C. Comp.), as follows: "The judge himself, or any juror, may be called as a witness by either party, but in the former case it is in the discretion of the court or judge to order the trial to be postponed or suspended, and to take place before another judge." Considering the trivial nature of the evidence elicited from the judge in the case at bar, he would have been guilty of a gross abuse of discretion had he postponed the trial to call another judge in his place. This section has been under consideration by this court, and the fact of the presiding judge testifying was held not to be error: *State v. Houghton*, 45 Or. 110 (75 Pac. 887).

13. Another alleged error is predicated upon the giving by the court of the following instruction: "But unless you find that defendant's fears of great bodily harm or danger to his life were such as a reasonably prudent man would have entertained under all the circumstances, then his act in striking the fatal blow was not justifiable or excusable, and you should find him guilty." The part of the charge excepted to is but an excerpt from the whole given on the subject, and is preceded by a long, careful and exceedingly fair exposition of the law of self-defense, and of the different degrees of homicide, but, taking it even as it stands above, it correctly states the law: Wharton, Homicide (3 ed.), p. 358; *State v. Smith*, 43 Or. 110 (71 Pac. 973). The requests of the defendant for special instructions were included in the general charge, so far as they were proper, and there was no error in refusing those not so given.

14. The next exception is that the jury were not polled before the court gave its instructions. The affidavits of the defendant's counsel are in the transcript, but they carefully avoid saying that any jurymen was absent. The bill of exceptions shows that all the jurors were present at the convening of court and that the trial was not at any time allowed to proceed without all the jurors, the defendant and his counsel being present. The transcript also shows that the jury were all present when the instructions were given, and the objection is frivolous.

15. The objection as to the irregularity of the grand jury is not well taken. Previous to the adoption of the constitutional amendment of June 1, 1908, the statute permitted the commencement of a criminal action by information, but provided that the court might, in its discretion, call a grand jury. The amendment above mentioned provided that thereafter no person should be charged in the circuit court with the commission of any crime except by indictment by a grand jury. The effect

of this constitutional amendment was not to repeal the previous law allowing courts to call a grand jury in their discretion, but to make that mandatory which had previously been directory. It appears from the transcript that the court ordered a grand jury to be regularly drawn, and it makes no difference whether the amendment was then in force or not; in either case the right to impanel a grand jury existed.

16. The next objection is that defendant was not represented by competent counsel. The defendant himself was a lawyer of several years' standing. Mr. Piggott, his partner, has also been a practicing attorney of this court for a number of years. In addition, he had also Mr. C. F. Lord, formerly district attorney for Multnomah County; Mr. Holcomb and Mr. Campbell, who both exhibited knowledge of law and experience in criminal trials. These attorneys were of his own choosing, and the record here shows that they defended him intelligently and zealously, and that everything was done that any attorney could probably have done to protect his interests and secure for him a fair trial. That they failed, after an intelligent and faithful effort, to secure his acquittal is not surprising, in view of the testimony disclosed in the record.

17. The last suggestion is that the infliction of the death penalty is contrary to Section 15, Article I, of the Constitution of this State. The section reads as follows: "Laws for the punishment of crime shall be founded on the principles of reformation and not of vindictive justice." The language used in this section not being entirely unambiguous, and not indicating clearly by its terms the effect that its framers intended it to have upon existing and future legislation, it becomes necessary to define the terms used therein, and to ascertain, through application of the usual methods of legal interpretation the design of its framers and the scope of its operation. There are three canons of interpretation that may be

applied to this section; and, tested by either of these, the contention of defendant's counsel cannot be sustained.

The first test, and one to which great weight is to be attached, is contemporaneous construction, and long acquiescence by the courts and legislatures: Endlich, Interpretation of Statutes, § 527. The present constitution was framed and adopted in 1857, and the State was admitted into the Union in 1859. By the provisions of the constitution the laws of the territory of Oregon were continued in force "so far as applicable" under the State government. The territorial law inflicted the death penalty for murder in the first degree, and no change was made in that penalty, or in the law itself, until the adoption of the Codes of 1864, when the same law, with the same penalty was re-enacted, with some slight amendments. During the interval the death penalty was not infrequently imposed and carried into effect. Among the members of the constitutional convention were Judges Boise, Prim, Shattuck, Kelly, Kelsay and Wait, all of whom were afterwards members of the Supreme Court of this State, and all of whom, excepting Judge Kelly, performed circuit duty. It is part of the judicial history of this State that all of these eminent jurists either pronounced the sentence of death while upon circuit duty, or participated in affirming such judgments when sitting upon the supreme bench. Rousseau well observes that "He who made the law knows best how it ought to be interpreted," and this judicial and legislative recognition of the validity of capital punishment by the very men who framed the constitution ought itself to be sufficient answer to the contention of defendant's counsel.

18. Another canon of construction by which to interpret the section in question is comparison with other sections of the constitution relating to the same or kindred subjects. Statutes in *pari materia* should be construed together as mutually explaining and interpreting each

other: Endlich, Interpretation of Statutes, § 35 *et seq.* To this test we will now put the section of the constitution above quoted. In Section 14, Article V of the constitution we find, among the powers delegated to the governor, the following: "He shall have power to grant reprieves," etc. Now a reprieve is a respite from a sentence of death. It is defined by Chitty as follows: "A reprieve operates only in capital cases, and is granted either by the favor of his majesty himself or the judge before whom the prisoner was tried, in his behalf, or from the regular operation of the law, in circumstances which render an immediate execution inconsistent with humanity and justice": 3 Chitty Cr. Law, p. 757. To adopt the theory of the defendant would be to assume that the framers of the constitution abolished capital punishment, and in the same instrument provided that the governor might reprieve any one whom the courts had adjudged to be so punished. The power to lawfully reprieve from the sentence of death pre-supposes the power to sentence to death, and is itself a recognition of the lawfulness of capital punishment.

19. Another canon of construction is that, when a constitutional provision has been taken or copied from the constitution of another state, after it has been construed by the courts of that state, it will be presumed to have been adopted with the construction placed upon it by the courts of the state where it originated: Endlich, Interpretation of Statutes, § 530. Applying this test, we find that the section in question was substantially copied from the constitution of the state of Indiana: Section 18, Article I, Constitution of Indiana. The constitution of Indiana was adopted in 1851, and, being one of the latest before the adoption of our own, naturally served in many particulars as a model. In 1855 the supreme court of that state construed this section: *Driskill v. State*, 7 Ind. 338; *Rice v. State*, 7 Ind. 332. In *Driskill v. State*, 7 Ind. 338, the court says: "In connection with this point

it is insisted that the law authorizing the death penalty is in conflict with Section 18 of the Bill of Rights, which requires the penal code to be founded on principles of reformation, and not of vindictive justice. The punishment of death for murder in the first degree is not in our opinion vindictive, but even-handed justice. There is indeed nothing vindictive in our penal laws. The main object of all punishment is the protection of society. With that end in view the legislature have, in a given case, left it within the discretion of the jury to say when the death penalty shall be inflicted. It is true one branch of that discretion does not contemplate reform; still, it is the only instance in the law in which the purpose of reformation is not prominent, and it cannot, it seems to us, be allowed to give character to the principles upon which the entire code is founded. The eighteenth section of the Bill of Rights, when properly construed, requires the penal laws to be so framed as to protect society, and at the same time, as a system, to inculcate the principle of reform. In this view the present code is no doubt founded on the principles of reformation, within the spirit and intent of the constitution. The law which allows the death penalty to be inflicted must, therefore, be held valid."

The framers of our constitution adopted this section with the robust and salutary construction it had already received in the state of its origin. In addition to this, the very section under consideration has already been construed by this court in an early case, but by reason of this subject not being noticed in the syllabus or in the digests, it has been generally overlooked by the profession. We refer to *State v. Anderson*, 10 Or. 448. In this case the court, speaking by Mr. Chief Justice WATSON, says: "It must be regarded as settled in this State that the constitution does not prohibit the legislature from enacting laws for the infliction of capital punishment in proper cases; but, if the question could be

considered open at this time, we should not hesitate to decide that the construction claimed by appellants' counsel for the provision referred to was inadmissible."

We have thus examined every contention of counsel, and can find no reason why a new trial should be granted in this case. We are not unmindful of the terrible consequences of this decision to the defendant, but they are only such as the application of the law to his own conduct has produced.

The judgment of the lower court is affirmed.

AFFIRMED.

Argued March 16, decided May 26, modified on rehearing August 17, further rehearing denied October 5, 1909.

ALEXANDER v. MUNROE.

[101 Pac. 908; 108 Pac. 514.]

ATTORNEY AND CLIENT—COMPENSATION—PROTECTION OF LIEN—REMEDY.

1. The remedy of an attorney receiving from his client, who had obtained a judgment against a third person for a specified sum, and who had instituted a suit to subject real estate to the payment of the judgment, a half interest in the judgment and in the security therefor claimed in the pending suit, is only in equity on his ceasing to represent the client and on the client satisfying the judgment pursuant to a fraudulent settlement with the third person.

LIS PENDENS—SUIT BY ASSIGNEE OF JUDGMENT—EFFECT.

2. A suit by an assignee of a half interest in a judgment and in real estate sought to be subjected to the payment of the judgment in a pending creditor's suit, to protect his rights as against a fraudulent settlement entered into between the assignor and the judgment debtor stipulating for the cancellation of the original judgment and of the decree in the creditor's suit subjecting real estate to the payment of the original judgment, brought within the life of the original judgment, is *lis pendens* and keeps alive the equitable lien, and a decree establishing his rights may be rendered after the judgment has ceased to be a lien on the real estate.

JUDGMENT—ASSIGNMENTS—EFFECT AS TRANSFERRING PERSONAL LIABILITY OF JUDGMENT DEBTOR.

3. An assignment of a part of a judgment adjudicating the personal liability of the judgment debtor, transfers to the assignee a portion of such personal liability.

JUDGMENT—LIEN—REMEDIES AFTER TERMINATION.

4. A judgment creditor assigned a half interest in the judgment and in real estate sought to be subjected to the payment of the judgment by a pending creditor's suit. Thereafter the judgment creditor obtained a decree subjecting the real estate to the judgment, and thereafter he and the judgment debtor, in fraud of the assignee, settled the litigation. The assignee, before the filing of the cancellation of the judgment and during the life of the judgment, sued to enjoin the filing thereof and to secure his interest in

the real estate. Pending that suit, a suit to foreclose a mortgage on the real estate was brought, and the assignee filed a cross-bill seeking to enforce his interests under the assignment. *Held*, that the right of the assignee to enforce his portion of the judgment as a lien on the land was not affected by the fact that execution had not issued on the judgment within ten years from the rendition thereof at the time of the institution of the foreclosure suit; but his rights depended on a new decree, which must be rendered pursuant to his cross-bill, reserving to him his rights as they existed at the time of the fraudulent settlement.

JUDGMENT—LIEN—COMMENCEMENT.

5. Where a judgment creditor obtained a decree against the judgment debtor and his grantees, setting aside deeds of lands and subjecting the same to the payment of the judgment, the lien of the decree ran from the time it became final, and lapse of time from the entry of the judgment did not operate to cancel it.

JUDGMENT—PARTIAL ASSIGNMENT—EFFECT.

6. A partial assignment of a judgment without the consent of the judgment debtor is not enforceable at law, but operates as an equitable assignment, and the judgment debtor, having knowledge of the assignment, cannot settle with the judgment creditor to the prejudice of the assignee.

ELECTION OF REMEDIES—EFFECT—REMEDIES BARRED.

7. The fact that an assignee of a part of a judgment, commenced an attachment against the judgment creditor to attach the sum paid by the judgment debtor in consideration of a settlement of the judgment, pursuant to an agreement between the judgment creditor and judgment debtor, does not estop the assignee from instituting a suit to enforce his rights against real estate made subject to the payment of the judgment; the judgment debtor not having been misled or caused to act to his injury.

LIMITATION OF ACTIONS—PLEADING AS DEFENSE—NECESSITY.

8. The defense of limitations, if not taken by demurrer or answer, is waived.

APPEAL AND ERROR—PRESENTATION OF DEFENSE BELOW—LIMITATIONS.

9. Where a mortgage foreclosure trial proceeded until the close of the mortgagee's case without raising the issue of limitations, and the mortgagor's liability was conceded, the defense of limitations was waived, and an answer subsequently filed without leave of court, setting up the defense of limitations, must be disregarded on appeal, though a motion to strike out the answer was not allowed.

BILLS AND NOTES—CONSIDERATION—PRIMA FACIE EVIDENCE.

10. A note itself is *prima facie* evidence of the consideration therefor.

MORTGAGES—FORECLOSURE—PERSONAL JUDGMENT.

11. Where the decree in a creditors' suit was not intended to operate as a personal judgment against the fraudulent grantor, but only as a determination of the amount due intervenors to settle the extent of the liability of the property involved therein, intervenors were not entitled to a personal judgment against such fraudulent grantor in a subsequent suit to foreclose a mortgage on the property.

JUDGMENT—PAYMENT—PRESUMPTION—EQUITABLE EXECUTION.

12. A creditors' suit, commenced during the life of a judgment, to subject property to the payment thereof, not available by execution at law, operates as an equitable execution sufficient to suspend limitations under Section 241, B. & C. Comp., providing that, after the lapse of ten years without an execution, a judgment shall be conclusively presumed to be paid.

From Washington: THOMAS A. MCBRIDE, Judge.

Suit by Jessie Alexander against Edith Munroe and others, in which Zera Snow and others filed cross-bills, to enforce a partial assignment of a judgment and to foreclose mortgages. From a judgment granting relief as prayed for in the cross-bills, defendant, Edith Munroe, appeals.

Statement by MR. JUSTICE EAKIN.

Jackson Munroe, in a divorce suit against defendant, Edith Munroe, besides the decree of divorce, recovered a judgment for the sum of \$1,487, rendered July 21, 1891. Pending that suit, Edith Munroe conveyed to her mother, Margaret Vedder, and another, in fraud of Jackson Munroe, the real estate involved here, and on August 4, 1891, Jackson Munroe brought a creditor's suit against them to cancel such conveyances and subject the property to the payment of his judgment. The latter suit resulted in a decree, July 19, 1894, in favor of Jackson Munroe, for the recovery of the amount of the original decree and interest, \$2,465.05, and adjudging the deeds void as to him, and subjecting the property to the payment of the judgment; and that it is a lien on such real property, namely, beginning at the southwest corner of the donation land claim of D. B. Dustin, in Washington County, Oregon, and running thence north 140 rods, thence east 91 5-14 rods, thence south 140 rods, and thence west to the place of beginning.

Thomas H. Tongue, now deceased, represented Edith Munroe, as her attorney, in all of the litigation, and until the year 1896, Zera Snow and S. B. Huston were counsel for Jackson Munroe therein. Pending such litigation, and subsequent to the decree in the divorce suit, Jackson Munroe duly assigned to Huston and Snow one half of the judgment in the divorce suit, in the following words:

"Whereas, the undersigned, Jackson Munroe, was defendant in a divorce suit brought against Mr. Munroe

in the Washington County Circuit Court by a decree in which, after an appeal to the supreme court of the State and a direction therefor, there was decreed to said Jackson Munroe the payment of certain moneys. And whereas, there is now pending by the said Jackson Munroe against Edith Munroe and others in the said circuit court for the county of Washington a suit to charge upon certain landed premises, as a lien, the said moneys decreed to the said Jackson Munroe, the said landed premises consisting of the following described property, to wit: Commencing at the southwest corner of the donation land claim of D. B. Dustin; running thence north 140 rods; thence east 91 5-14 rods; thence south 140 rods; thence west to the place of beginning, containing 80 acres.

"Now in consideration of legal services rendered by W. B. Gilbert, Zera Snow, and S. B. Huston, and in consideration of future services to be rendered in the said cause last above named, I, Jackson Munroe, do hereby assign and transfer to Zera Snow and S. B. Huston one half of my claim embraced and determined by the divorce suit above mentioned, and embraced in the suit last above named, pending in Washington County, together with an undivided half interest in the security therefor now claimed upon the landed premises above described, together with an undivided half interest in the said landed premises. And it is understood likewise that in the event that there shall be any advance made by the parties to whom this transfer is made, or either of them, an account of the same shall be kept and the same shall be chargeable against my remaining interest in the said claim and premises. Executed in triplicate. Dated at Portland, Oregon, December 31, 1892. Witness my hand and seal.

Jackson Munroe.

[Seal.] Executed in the presence of Olive A. Jenner."

Afterwards on June 20, 1896, Jackson Munroe and Edith Munroe, in consideration of \$500 paid by Edith to Jackson, compromised the subject of the litigation, and Jackson executed to Edith a cancellation of the judgments and decrees, and also a quitclaim deed to the property, at which time the second suit was pending upon appeal in the supreme court, and, as part of the agreement of settlement, the appeal was dismissed; but before

the cancellation of the decrees was filed, July 6, 1896, Snow and Huston commenced a suit against Jackson and Edith Munroe *et al.* to enjoin the filing thereof and to secure their interest in the decree on the ground that such settlement was executed and taken by Edith Munroe with full knowledge on her part that Snow and Huston were the owners and equitable assignees of one half thereof, and of the lien securing the same; and that such cancellation and deed were executed by collusion and conspiracy, between Jackson and Edith Munroe, for the purpose of defrauding Snow and Huston of their rights in the decree, which suit is still pending.

At the time the cancellation of said decrees was executed, July 20, 1896, Thomas H. Tongue furnished \$500 to Edith Munroe with which to pay Jackson Munroe the amount of said settlement and took a mortgage from her in the sum of \$1,000, upon the land in question, to secure the sum so advanced and his attorney fees. He also held, at that time, another mortgage upon the same property, executed May 20, 1893, securing the sum of \$275.

The present suit was commenced December 8, 1904, by Jessie Alexander against Edith Munroe, appellant, Jackson Munroe, Zera Snow, S. B. Huston and E. B. Tongue, administrator of the estate of Thomas H. Tongue, deceased, *et al.*, to foreclose a mortgage executed for his benefit by Mrs. Vedder prior to the commencement of this litigation, and in regard to which there is no controversy here. The issues arise upon the cross-bills of Snow and Huston and E. B. Tongue, administrator, against Edith Munroe *et al.* Snow and Huston by their cross-bill seek to enforce against Edith Munroe and the property, through the decrees, the equitable assignment to them by Jackson Munroe of a half interest in such decrees, which cross-bill recites the facts above set forth.

In the answer of Edith Munroe to the cross-bill of Snow and Huston, she pleads: That, no execution having

issued on the decree of July 21, 1891, their claim against her is barred by limitation, and that they have no interest in any judgment against her on which execution has issued within 10 years prior to the commencement of this suit; that she is not personally liable to them; and that the judgments are satisfied by her settlement with Jackson Munroe. She also pleads that Snow and Huston are, and ought to be, estopped from claiming any lien in the judgments, because after the cancellation thereof on July 6, 1896, they, with full knowledge of all the facts, commenced an attachment suit against Jackson Munroe for the amount of their claim, for the purpose of attaching the \$500 paid to him in the settlement on June 20, 1896. The attachment suit is admitted by Snow and Huston, but they deny that it was with knowledge of the facts, and aver that it was commenced at the request of Edith Munroe and for her benefit, and was dismissed long before the commencement of this suit.

Snow and Huston, in their reply, by way of estoppel, say that Edith Munroe is and should be estopped from claiming the statute of limitations, because she prevented and refused to permit the clerk to issue execution on said judgment when directed by Snow and Huston within the period of limitation. The defendant, E. B. Tongue, administrator, by his cross-complaint, seeks to foreclose the two mortgages held by him against Edith Munroe upon the property; the first one being for the sum of \$275, dated May 20, 1893, with an alleged credit thereon of \$75, dated September, 1903, and the second one being dated June 11, 1896, for the sum of \$1,000. By an answer filed after the trial, January 13, 1906, Edith Munroe pleads the bar of statute of limitations to the first of these mortgages, denies the credit of \$75 thereon, and alleges that the second mortgage was without consideration. The pleadings make some issues between Snow and Huston and Tongue, but their differences have been stipulated and require no consideration. The pleadings

in the case are quite lengthy, but we think this statement will sufficiently disclose the points involved here.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Edward B. Watson*.

For plaintiff and respondent there was a brief over the names of *Messrs. Caples & Allen*.

For defendants and respondents there was a brief over the names of *Mr. Wallace McCamant, Mr. Zera Snow, Mr. Samuel B. Huston, Mr. Frank F. Freeman* and *Mr. Thomas H. Tongue, Jr.*, with oral arguments by *Mr. Huston* and *Mr. Tongue*.

MR. JUSTICE EAKIN delivered the opinion of the court.

1. Considering first the cross-bill of Snow and Huston, the most important question is whether, by reason of the fact that no execution issued within 10 years after the rendition of the decrees in favor of Jackson Munroe, Snow and Huston are without remedy against the property of Edith Munroe. After Snow and Huston ceased to represent Jackson Munroe, which at the latest was July 6, 1896, when they brought their suit against him and others, their authority, as his attorneys, to issue execution thereon, was at an end, and, not being parties to the decree, they had power to act only in the name, and by the authority of Jackson Munroe, who, by the satisfactions he had executed, had already put it beyond his power to direct or authorize execution to issue. Therefore, on July 6, 1896, the only remedy of Snow and Huston was in a court of equity.

2. The attempted settlement of the judgments by collusion, between Edith and Jackson Munroe, with full knowledge of the rights of Snow and Huston, which put it out of their power to keep the judgments alive, was a fraud upon them, and the commencement of the suit by them on July 6, 1896, to protect their rights, being

within the life of the two decrees, was *lis pendens*, and kept alive their equitable lien. It is held in *Davidson v. Burke*, 143 Ill. 139 (32 N. E. 514: 36 Am. St. Rep. 367), that a judgment creditor having brought a creditor's suit to uncover property fraudulently conveyed by the judgment debtor, although the creditor's judgment was barred by the statute of limitations at the time of final decree, yet, when he exhibited his bill in chancery to impeach the conveyance, the *lis pendens* was an equitable levy and created an equitable lien on the lands, and it was wholly unimportant that the final decree, establishing the lien, was not rendered until long after the judgment at law had ceased to be a lien upon the property of the creditor. To the same effect is *Cincinnati v. Hafer*, 49 Ohio St. 60 (30 N. E. 197). *Dempsey v. Bush*, 18 Ohio St. 376, is quite in point. A creditor obtained judgment against a debtor and his sureties. The sureties paid the judgment to relieve their own property from the lien. A mortgagee of the property, under a mortgage taken after entry of the judgment, but before its payment, brought suit, after payment, to foreclose his mortgage, making the sureties in the judgment parties. They set up their rights under the judgment as equitable assignees of it, claiming priority over the mortgage, and it was held that their rights under the judgment were prior and superior to the mortgage, notwithstanding the judgment became dormant pending the litigation, as the sureties had no remedy by execution and had set up their equities in the foreclosure suit (in which the securities were marshaled) while their judgment was alive, and that their rights were preserved.

3. It is urged by counsel for Edith Munroe that she is not personally liable to Snow and Huston; but the original debt was her debt, and the assignment to Snow and Huston transferred to them a portion of that personal liability, which carries with it a like portion of the security

through the judgment, but only enforceable in Snow and Huston's favor in equity.

4. It was the fraud and collusion of Edith Munroe with Jackson Munroe that put it beyond Snow and Huston's power to enforce their equity in the judgment, and their suit, brought within the life of the judgment, to prevent its cancellation and subject the property to the payment of their claim, and to establish and declare their interest therein, was in the nature of a proceeding to enforce their interest therein, and operates to suspend the running of the statute pending such proceeding. Pending that suit the present suit to marshal the securities was commenced and their rights set up herein, reciting the former suit and consolidating the same with the cross-bill in this suit. Their rights therefore depend upon a new decree to be rendered in this proceeding, which may reserve their rights as they existed on June 20, 1896, and they are not affected by the fact that execution had not issued on the decree of July 21, 1891, within 10 years from the rendition thereof: 3 Freeman, Ex. § 434.

5. The purpose of the suit commenced by Jackson against Edith Munroe et al., which resulted in the second decree was to avoid certain deeds and subject this real property to the payment of plaintiff's claim, and it was adjudged and decreed thereby that plaintiff have and recover, from defendant Edith Munroe, \$2,465.05, the same being the amount of a money decree, interest, and costs, entered on July 21, 1891, and adjudged and decreed said sum, now found due, to be a lien upon said property, and providing for process to enforce said decree after 10 days from date thereof. Counsel for Edith Munroe contends that the commencement of that suit did not interrupt or suspend the running of the statute of limitations as to the first decree. Without deciding that question, so far as it relates to the decree of July 21, 1891, the lien of the decree of July 19, 1894, will run from the time it became final, and lapse of time from entry of the decree

of July 21, 1891, cannot operate to cancel the latter. So far as this particular property is concerned, against which the second decree operates, it may be enforced by process issued thereon. The decree was entered by the circuit court on July 19, 1894, but defendant appealed therefrom and gave an undertaking for stay of proceeding pending the appeal, and the period of limitations did not begin to run against that decree until it became final. The decree of the circuit court did not become final until the appeal therefrom was dismissed in the supreme court, which was not earlier than June 20, 1896, and in that case the statute had not run against the second decree at the time Snow and Huston filed their cross-bill in this suit, December 30, 1904: 1 Freeman, Ex. § 28.

6. Counsel for Edith Munroe contends that a partial assignment of the judgment does not bind the debtor or curtail her right to deal with the judgment creditor in relation to the judgment. Although a partial assignment of the judgment cannot be made without her consent to be enforceable at law, yet it operates as an equitable assignment thereof, and if the judgment debtor is aware of the transfer she cannot settle with the judgment creditor to the prejudice of the assignee: *Little v. City of Portland*, 26 Or. 235-242 (37 Pac. 911). It is held in *P. C. C. R. R. Co. v. Volkert*, 58 Ohio St. 363 (50 N. E. 924), that an assignment to an attorney of a half interest in the judgment obtained by him for his services in procuring it, conveys a property right in the judgment, and, although it is not enforceable at law, it is in equity, and it is not in the power of the judgment debtor, after knowledge thereof, to compromise the judgment with the creditor alone, and thus defeat the assignee. To the same effect are *Friendly v. Lee*, 20 Or. 202 (25 Pac. 396); *Line v. McCall*, 126 Mich. 497 (85 N. W. 1089); *Weeks v. Circuit Judges*, 73 Mich. 256 (41 N. W. 269); *Phillips v. Edsall*, 127 Ill. 535 (20 N. E. 801). And in *Warren v. Bank of Columbus*, 149 Ill. 9, 24 (38 N. E. 122: 25

L. R. A. 746), it is further held that an equitable assignment will not only reach the fund in the hands of the original depository, but follow it or its proceeds in the hands of any one receiving it with notice. To the same effect is *Dowell v. Cardwell*, 4 Saw. 217 (Fed. Cas. No. 4,039).

7. We find from the preponderance of the evidence that Edith Munroe, at the time she made the settlement with Jackson Munroe and procured from him the cancellation of the two decrees, had notice that Jackson Munroe had assigned to Snow and Huston one-half of the recovery in the decree of July 21, 1891, together with an undivided half interest in the security therefor in the lands involved in the second suit. The record in the attachment action is not before us, but there is no element of estoppel involved or pleaded in connection with the bringing of the attachment action by Snow and Huston. The attachment might have been dissolved had the writ been attacked on the ground that Snow and Huston held security for the debt, but the attempt to attach constitutes no representation or conduct by Snow and Huston that misled or caused Edith Munroe to act to her injury in relation thereto.

8. As to the claim of defendant E. B. Tongue, administrator, the first important question is whether the note and mortgage of date May 20, 1893, for \$275, was barred by the statute of limitations at the time of the commencement of this proceeding. The answer and cross-bill of Tongue, by which the note and mortgage are set up in this suit, filed August 2, 1905, is the commencement of the suit, so far as these mortgages are concerned, and if the mortgage was not renewed it would have been barred by the statute of limitations if taken advantage of by Edith Munroe; but the defense of the statute of limitations, if not taken by demurrer or answer, is waived: *Davis v. Davis*, 20 Or. 78 (25 Pac. 140). The first answer of Edith Munroe in this suit, referring to these

two mortgages, admits her liability thereon in the sum of \$1,424, which, according to her testimony, includes the amount of the first mortgage, for which sum she agrees that said estate shall have decree in this suit and prays the court to determine the amount due from defendant to the estate of T. H. Tongue, deceased, which may be a lien on said property.

9. The trial of the suit was had before the judge on December 28, 1905, without any other answer on the part of Edith Munroe to the cross-bill of Tongue, at which trial Tongue identified and offered in evidence the notes and mortgages, to which defendant stated she had no objection, and they were received. At the close of the evidence on the part of Tongue, defendant Edith Munroe moved the court for a decree against the Tongue estate that no greater sum be entered in his favor than \$1,425, with interest. The answer, setting up the defense of the statute of limitations, was not filed until after the completion of the trial and submission of the cause. There was a motion and affidavit filed in the lower court by Tongue to strike out this answer; but we find no ruling on the motion in the record, although counsel for Tongue claim it was allowed and the answer stricken out. However, in view of the fact that the trial proceeded, at least until the close of Tongue's case in chief, without raising that issue, and Edith Munroe's liability being conceded, that defense must be deemed waived, and, if the motion to strike out the answer was not allowed, still, as it was filed after default and apparently without leave of the court, it will be disregarded here.

10. The only remaining question relating to the claim of the Tongue estate is as to the amount due upon the \$1,000 mortgage. It is conceded that \$500 of that mortgage was cash, loaned to Edith Munroe to pay Jackson Munroe upon the settlement, and Tongue contends that the remainder thereof was for his attorney fees in this litigation. Her counsel contends that there could not

have been \$500 attorney fees due Thomas H. Tongue at the time of the execution of the mortgage, insisting that the \$275 mortgage was for attorney fees to the date thereof; but that mortgage was executed more than a year before the close of the second suit, and we do not find that any witness in the case testified that it was given for attorney fees. Edith Munroe does not mention the consideration for it and makes no claim that it was for attorney fees. On the contrary, she replies, when asked about the payment of attorney fees to Tongue, prior to the execution of the \$1,000 mortgage: "I had already paid Mr. Tongue different sums, at different times. At different times, I do not remember dates." She said she could not give any amounts or dates, and the statements of Thomas H. Tongue, deceased, were proved to the effect that the \$1,000 mortgage included \$500 attorney fees. This mortgage was executed on June 11, 1896, and Edith Munroe admits that for nine years she did not mention to Tongue that it was given for more than was due him. She says she was waiting until final settlement. Her letter of May 3, 1899, three years after the date of the note, in which she promises to raise the amount of interest due, makes no suggestion of error, and practically acknowledges liability for the mortgage. The note itself is *prima facie* evidence of the consideration, and the statements of Edith Munroe do not convince us that the consideration was less than its face value, and we find no error in the findings of the court in relation thereto.

The decree is affirmed.

AFFIRMED.

Modified August 17; further rehearing denied October 5, 1909.

ON PETITION FOR REHEARING.

[108 Pac. 514.]

MR. JUSTICE EAKIN delivered the opinion of the court.

11. Counsel for defendant, Edith Munroe, urges that the decree of the lower court is erroneous to the extent

that it includes a personal judgment against her for the sum of \$2,357.45 due Huston & Snow. As the whole relief sought by Huston & Snow grows out of the decree in the creditors' suit, of date July 19, 1894, and as the decree in that suit was evidently not intended to operate as a personal judgment against Edith Munroe, but only a determination of the amount due, for the purpose of settling the extent of the liability of the property involved therein, it does not justify a personal judgment in this suit against Edith Munroe in favor of Huston & Snow, other than to fix the amount for which the property is liable, and it should not operate as a deficiency judgment.

12. Counsel again urges that, the 10 years' limitation having elapsed since entry of the decree of 1891, the decree is conclusively presumed to be paid, and therefore cannot be the basis for any relief. The effect of that statute (Section 241, B. & C. Comp.) is that, after the lapse of 10 years without an execution being issued, the judgment shall be conclusively presumed to be paid. In *Bowman v. Holman*, 53 Or. 456 (99 Pac. 424), this court held that the effect thereof takes away the right as well as the remedy that theretofore existed; but in this case a creditors' suit was commenced within the life of the judgment, which, so far as the property involved is concerned, is a suit on the former judgment, and, being within the necessity recognized as sufficient to justify a suit on a judgment in *Pitzer v. Russel*, 4 Or. 124, necessarily renews it, at least as against this particular property.

This suit was brought to reach assets not available by an execution at law. It is in the nature of an equitable execution, or equitable relief which is granted on the ground that there is no remedy at law. It is taking out of the way a hindrance which prevents the execution at law, in effect a substitute for an execution: *In re Shephard*, 43 Ch. Div. 131; *In re Craig & Leslie*, 18 Ont. Pr.

270; *Hatch v. Van Dervoort*, 54 N. J. Eq. 511 (34 Atl. 938); *Hunt v. Wolfe*, 2 Daly (N. Y.) 298, 303; High, Receivers, § 2. These authorities refer particularly to the proceeding by a receiver as constituting an equitable execution, in which the court takes the property and applies it to the payment of the judgment (High, Receivers, § 2); and the process and relief in a creditors' suit come equally within the principle, and prevent the statute from running, at least as to the particular property involved. To the same effect are the Illinois and Ohio cases cited in the opinion.

The decree will be modified to the extent of denying the deficiency judgment.

AFFIRMED: MODIFIED: FURTHER REHEARING DENIED.

MR. JUSTICE MCBRIDE, having heard this case in the lower court, took no part in this decision.

Argued July 21, decided August 3, rehearing denied October 5, 1909.

STATE v. DALEY.

[108 Pac. 502; 104 Pac. 1.]

CRIMINAL LAW—INSTRUCTIONS—OBLIGATION OF JURY.

1. Under Section 16, Article I, Constitution of Oregon, providing that in criminal cases the jury shall determine the law and the facts under the direction of the court as to the law, the jury have not the moral right to disregard the directions of the court as to the law, and in determining the guilt or innocence of accused they should, as required by Section 1410, B. & C. Comp., receive the law from the court, though they have the power to disregard the instructions and acquit accused, who cannot, because of Section 12, be again placed in jeopardy for the same offense.

CRIMINAL LAW—TRIAL—INSTRUCTIONS—PUNISHMENT.

2. The court, in charging that the jury in finding accused not guilty on the ground of insanity should state that fact in the verdict, properly refused to charge, in the language of Section 1424, B. & C. Comp., that the court on such a verdict must commit accused to a lunatic asylum, where it deems his being at large dangerous to the public safety; whether accused should be so confined being for the court alone.

CRIMINAL LAW—TRIAL—INSTRUCTIONS—PUNISHMENT.

3. Where the jury are not authorized by statute to prescribe the punishment, it is not error to refuse to instruct what the penalty may be if accused is found guilty as charged or of a lesser offense included in the indictment.

CRIMINAL LAW—APPEAL—EXCEPTIONS BELOW.

4. Any error of the court in failing in its duty, under Section 16, Article I, Constitution of Oregon, to instruct, without request, on all questions of law arising in the case, is unavailable on appeal, unless exception was reserved.

(MR. JUSTICE KING dissenting.)

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Harry Daley was indicted for the crime of murder in the first degree and by the verdict of a jury was found guilty as charged in the indictment. From the judgment of death following such conviction, he appeals.

AFFIRMED.

For appellant there was a brief over the names of *Mr. John H. Stevenson* and *Mr. Lester W. Humphreys*, with an oral argument by *Mr. Stevenson*.

For the state there was a brief over the names of *Mr. Andrew M. Crawford*, Attorney General; *Mr. George J. Cameron*, District Attorney, and *Mr. J. H. Page*, Deputy District Attorney, with an oral argument by *Mr. Page*.

Opinion by MR. CHIEF JUSTICE MOORE.

The defendant, Harry Daley, was convicted of the crime of murder in the first degree, alleged to have been committed by killing Harry Kenny purposely and with deliberate and premeditated malice. He appeals from the sentence of death which resulted; his counsel contending that an error was committed in refusing to instruct the jury as requested, to which denial an exception was taken.

1. Evidence was offered at the trial tending to show that by reason of mental incapacity the defendant was not responsible for the killing, and, based thereon, his counsel requested the court to charge the jury as follows:

"The defense of insanity having been interposed by the defendant, in this case, you are instructed that if you find him not guilty on that ground, to state the fact in your verdict (and the court must thereupon, if it deems his being at large dangerous to the public peace or safety, order him to be committed to any lunatic asylum authorized by the state to receive and keep such persons, until he becomes sane, or be otherwise discharged therefrom by authority of law)."

That part of the charge so requested, which is included within the parentheses as here indicated, was refused;

but the remainder of the instruction was given. The clause so excluded is copied from a part of the statute directing the manner of caring for a person considered dangerous, who, by reason of insanity, has been acquitted of the commission of a crime: Section 1424, B. & C. Comp. The defendant's counsel, invoking a provision of the organic law of this state, to wit: "In all criminal cases whatever, the jury shall have the right to determine the law and the facts, under the direction of the court, as to the law" (Section 16, Article I, Constitution of Oregon), argue that the jury should have been informed that a verdict of not guilty, by reason of insanity, did not necessarily discharge the accused, but that, if the court had considered him dangerous to the public peace or safety, he could have been confined in a lunatic asylum, thereby preventing further injury, and that the failure so to charge did not allay the fear which the jury entertained that the defendant might kill some other person, and induced the verdict which was returned.

The doctrine that in criminal cases the jury should have the right to determine the law and the facts probably originated in the American Colonies prior to the Revolution, and was a protest against what was considered to have been the arbitrary rulings of the judges in the trial of causes involving freedom of speech and of the press: *Williams v. State*, 32 Miss. 389, 396 (66 Am. Dec. 615). A text-writer, speaking upon this subject, observes:

"In many of the states the arbitrary temper of the colonial judges, holding office directly from the crown, had made the independence of the jury in law, as well as in fact, of much popular importance. Thus, John Adams, in his Diary for February 12, 1771, in a passage which is probably either an extract from or a memorandum of a speech before the colonial legislature, urges that in the then state of things public policy demanded that not only in criminal, but in civil cases, juries should be at liberty to take the law in their own hands": Wharton's Crim.

Pl. & Pr. (8 ed.), § 806. To the same effect see *Sparf & Hansen v. United States*, 156 U. S. 51, 143 (15 Sup. Ct. 273: 39 L. Ed. 343).

The earliest recorded assertion of this legal principle which we have found appears in the report of the trial of John Peter Zenger for libel, before JAMES DE LANCY, Chief Justice, in the province of New York, August 4, 1735 (17 Howell's St. Tr. 675, 706), as follows:

Mr. Chief Justice: "All words are libelous, or not, as they are understood. Those who are to judge of the words must judge whether they are scandalous or ironical, tend to the breach of the peace, or are seditious. There can be no doubt of it." Mr. Hamilton, attorney for the defendant, said: "I thank your honor. I am glad to find the court of this opinion. Then it follows that those 12 men (the jurors) must understand the words in the information to be scandalous; that is to say, false; for I think it is not pretended they are of the ironical sort; and when they understand the words to be so, they will say we are guilty of publishing a false libel and not otherwise." Mr. Chief Justice: "No, Mr. Hamilton, the jury may find that Mr. Zenger printed and published those papers, and leave it to the court to judge whether they are libelous. You know this is very common. It is in the nature of a special verdict, where the jury leave the matter of law to the court." Mr. Hamilton: "I know, may it please your honor, the jury may do so; but I do likewise know that they may do otherwise. I know they have the right, beyond all dispute, to determine both the law and the fact; and where they do not doubt of the law, they ought to do so."

In the case of *Rex v. Shipley*, Dean of St. Asaph, 21 Howell's St. Tr. 847, 923, the defendant was tried at the Assizes of Shrewsbury, August 6, 1784, for the publication of a criminal libel. His attorney, Thomas Erskine, afterwards Lord Chancellor of Great Britain, referring to the doctrine under consideration, says: "A jury are no more bound to return a special verdict in cases of libel than upon other trials criminal and civil where law is mixed with fact. They are to find generally upon both,

receiving, as they constantly do in every court at Westminster, the opinion of the judge, both on the evidence and the law." The following verdict was returned in that case: "Guilty of publishing, but whether a libel or not, the jury do not find." In discharging a rule to show cause why there should not be a new trial, Lord MANSFIELD, at page 1034 of the volume referred to, replying to the point contended for by the defendant's counsel, remarked: "Circumstances which amount to a lawful excuse or a justification are proper upon the trial, and can only be used there. Upon every such defense set up of a lawful excuse or justification there necessarily arise two questions, one of law, the other of fact; the first to be decided by the court, the second by the jury." In a note to that case, appearing at page 1039, the following statement is made:

"Although the court was unanimous in discharging the rule, Mr. Justice WILLES, in delivering his opinion, sanctioned by his authority Mr. Erskine's argument that upon a plea of not guilty, or upon the general issue on an indictment or information for a libel, the jury had not only the power, but a constitutional right, to examine, if they thought fit, the criminality or innocence of the paper charged as a libel; declaring it to be his settled opinion, that notwithstanding the production of sufficient proof of the publication, the jury might upon such examination, acquit the defendant generally, though in opposition to the directions of the judge, without rendering themselves liable either to attain, fine or imprisonment, and that such verdict of deliverance could in no way be set aside by the court."

The doctrine thus asserted was generally recognized in this country for some time after the adoption of the Federal Constitution: Wharton's Crim. Pl. & Pr. (8 ed.) § 806. The fear that a judge, elected by popular vote, might encroach upon the rights of personal liberty in the trial of criminal actions has been very much dispelled, except possibly in causes involving political questions, and at the present time, in the absence of a constitutional or

statutory provision making the jury in a criminal action the judges of the law and the facts, the doctrine referred to rarely obtains. As tending to show the change of judicial utterance upon this question, attention will be called to a few decisions. Thus, in *Com. v. Knapp*, 10 Pick. (Mass.) 477, 496 (20 Am. Dec. 534), and in *Com. v. Kneeland*, 20 Pick. (Mass.) 206, 222, the doctrine was recognized by the Supreme Court of Massachusetts, but in later decisions by that tribunal it was rejected: *Com. v. Porter*, 10 Metc. (Mass.) 263; *Com. v. Anthes*, 5 Gray (Mass.) 185. In *Kane v. Com.* 89 Pa. 522 (33 Am. Rep. 787) it was admitted that the jury had the right to determine the law and the facts in the trial of a criminal cause; but thereafter that ruling was modified: *Nicholson v. Com.* 96 Pa. 503; *Com. v. McManus*, 143 Pa. 64 (21 Atl. 1018; 22 Atl. 761; 14 L. R. A. 89). In *State v. Croteau*, 23 Vt. 14 (54 Am. Dec. 90) a majority of the court held that the doctrine was applicable; but in *State v. Burpee*, 65 Vt. 1 (25 Atl. 964; 19 L. R. A. 145; 36 Am. St. Rep. 775) the former decision was expressly overruled. In *Sparf & Hansen v. United States*, 156 U. S. 51, 102 (51 Sup. Ct. 273; 39 L. Ed. 343), Mr. Justice HARLAN, in a masterly manner discusses this question, and says: "But upon principle, where the matter is not controlled by express constitutional or statutory provisions, it cannot be regarded as the right of counsel to dispute before the jury the law as declared by the court."

The constitution of Indiana contains a provision, as follows: "In all criminal cases whatever the jury shall have the right to determine the law and the facts." In construing that clause it was held that the court's refusal to permit counsel to argue to the jury, the constitutionality of a statute was erroneous: *Lynch v. State*, 9 Ind. 541. So, too, in *Williams v. State*, 10 Ind. 503, the jury was instructed as follows: "You are the exclusive judges of the evidence, and may determine the law; but it is as

much your duty to believe the law to be as charged to you by the court as it is your sworn duty to determine the evidence." And it was ruled that an error was committed, since the jury were the exclusive judges of the law and the evidence. In that case Mr. Justice HANNA writes a strong dissenting opinion. In *McDonald v. State*, 63 Ind. 544, it was decided that under the constitution of Indiana the jury in a criminal case are the exclusive judges of both the law and the evidence, and that the duty of the court in giving them instructions was merely advisory. In *Anderson v. State*, 104 Ind. 467 (4 N. E. 63: 5 N. E. 711), however, it was determined that an instruction which informed the jury that, "even if all the facts alleged in the indictment are established beyond a reasonable doubt, you have still the right to determine whether or not such facts, when so established, constitute a public offense under the laws of the state, and, if you determine that they do not, you have the right to acquit the defendant," was properly refused as implying an unnecessarily extreme construction of the constitutional right of a jury in a criminal case.

In *Franklin v. State*, 12 Md. 236, in construing a clause of the organic act of Maryland, as follows: "In the trial of all criminal cases the jury shall be the judges of law as well as fact," it was stated that the constitutional provision was merely declaratory of a pre-existing law regulating the powers of the court and jury; and it was held that the jury had no right to determine the constitutionality of an act of the assembly, and that the trial court properly prevented counsel from arguing that question before the jury.

A statute of Illinois contained the following enactment: "Juries in all criminal cases shall be judges of the law and the fact." In construing that clause in *Schnier v. People*, 23 Ill. 17, it was held that the jury, in a trial for murder, were the judges of the law and the fact, and

were not bound by the opinion of the court. See also to the same effect: *Fisher v. People*, 23 Ill. 283; *Falk v. People*, 42 Ill. 331. In *Mullinix v. People*, 76 Ill. 211, however, the following part of a charge having been given as requested, to wit: "The court instructs the jury for the defense that the jury are the sole judges of the law as well as the facts in the case"—there was added the following qualification: "But the jury are further instructed that it is the duty of the jury to accept and act upon the law, as laid down to you by the court, unless you can say, upon your oaths, that you are better judges of the law than the court; and if you can say, upon your oaths, that you are better judges of the law than the court, then you are at liberty to so act." And it was held that the modification was not erroneous, but eminently just and proper.

It will be borne in mind that the clause of our constitution under consideration confers upon the jury in all criminal cases the right to determine the law and the facts, "under the direction of the court as to the law," thereby restricting the authority of the jury to a much greater extent than is prescribed by the organic law of Indiana, or of Maryland, or by the statute of Illinois, to which notice has been directed. Notwithstanding the restricted application of the doctrine under consideration the jury in the trial of a criminal action in this state have the power to disregard the instructions of a court and to find a defendant not guilty. A verdict of that kind cannot be set aside, and necessarily discharges the defendant whose liberation results from the application of another clause of our organic act, to wit: "No person shall be put in jeopardy twice for the same offense": Section 12, Article I, Constitution of Oregon. Though such power of the jury is recognized, their right, in the trial of a criminal action, to ignore the charge of the court, may well be doubted, for if an instruction misstates the law appli-

cable to the facts involved, and the defendant is found guilty, the error which has been committed can be corrected on appeal. If, however, the jury assuming to be the judges of the law, contrary to the direction of the court, return a verdict of not guilty in a criminal action, the public necessarily sustains an injury which cannot be legally corrected. It is to the credit of the jury system that such mistrials seldom occur, except in actions involving the commission of minor offenses, in which quite a public sentiment seems to be opposed to the strict enforcement of municipal or legislative enactments.

2. The instructions given at the trial of a criminal action relating to the questions of law involved ought to bind the consciences of the jurors, prompting them to return a just verdict, though a defendant might be found guilty; and, while the jurors possess the power referred to, they have not the moral right to disregard the directions of the court as to the law. In the trial of a criminal case, the jury, in determining the guilt or innocence of the party accused, which consists of a mixed question of law and fact, should always be governed by the court's direction as to the law, as expressly indicated by our constitution: Section 1410, B. & C. Comp; *State v. Reed*, 52 Or. 377 (97 Pac. 627); *State v. Walton*, 53 Or. 557 (99 Pac. 431). An examination of the instruction requested will show that the language employed only indirectly involved the question of the guilt or innocence of the defendant, so far as that deduction might be influenced by the sentence which would be pronounced against him. If the jury concluded that in consequence of the defendant's mental incapacity he was not responsible for the killing, they should have returned a verdict of not guilty by reason of insanity. Whether or not the defendant should be confined in a lunatic asylum was not a matter for the jury to consider. The determination of that question devolved exclusively upon the court: Section 1424, B. & C. Comp.

3. Where the jury are not authorized by statute to prescribe the punishment to be inflicted for the commission of a crime, no error is committed in refusing to instruct them what the penalty might be if the defendant is found guilty as charged, or if convicted of a lesser offense included within the greater, as specified in the indictment: 11 Enc. Pl. & Pr. 208; Blashfield's Instructions to Jurors, § 186; *Russell v. State*, 57 Ga. 421; *Wood v. People*, 1 Hun (N. Y.) 381; *People v. Ryan*, 55 Hun (N. Y.) 214 (8 N. Y. Supp. 241). A different conclusion was reached in *People v. Cassiano*, 30 Hun (N. Y.) 388, a case relied upon by defendant's counsel. In *Ford v. State*, 46 Neb. 390, 396 (64 N. W. 1082), in referring to the preceding decision, Mr. Chief Justice NORVAL says: "The case decided by the New York court, already cited, sustains the contention of counsel for plaintiff in error; but it is not a well-considered opinion, nor is any authority cited in that state, or elsewhere, to support the doctrine."

No error was committed in refusing to give the instruction requested, and the judgment is affirmed.

AFFIRMED.

Decided October 5, 1909.

ON PETITION FOR REHEARING.

[104 Pac. 1.]

Opinion by MR. CHIEF JUSTICE MOORE.

4. In a petition for a rehearing herein attention is called to the case of *State v. Cody*, 18 Or. 506, 521 (23 Pac. 891; 24 Pac. 895), where the doctrine was proclaimed that under the organic law of this state (Section 16, Article I, Constitution of Oregon) it was the duty of a court, without a request therefor, to instruct the jury as to all questions of law that might arise at the trial of a criminal action, and that a failure so to charge con-

stituted reversible error, though no exception to the alleged neglect was reserved. That part of the opinion relied upon was expressly overruled in the case of *State v. Foot You*, 24 Or. 61, 70 (32 Pac. 1031: 33 Pac. 537), and the legal principle last announced had been subsequently followed: *State v. Smith*, 47 Or. 485, 490 (83 Pac. 865); *State v. Reyner*, 50 Or. 224, 232 (91 Pac. 301).

Believing that no error was committed in the trial of this cause, the petition for a re-hearing is denied.

AFFIRMED: REHEARING DENIED.

MR. JUSTICE KING delivered the following dissenting opinion on the petition for rehearing:

Defendant was charged, tried and convicted of murder in the first degree. At the trial his counsel interposed the defense of insanity, pursuant to which the court was requested to instruct the jury that: "The defense of insanity having been interposed by the defendant in this case, you are instructed that if you find him not guilty on that ground, to state the fact in your verdict, and the court must thereupon, if it deems his being at large dangerous to the public peace or safety, order him to be committed to any lunatic asylum authorized by the state to receive and keep such persons until he becomes sane, or be otherwise discharged therefrom, by authority of law." All of that portion of the requested instruction after the word "verdict" was refused by the trial court. This refusal is assigned as error, and constitutes the sole question presented. I think it clear from the instruction requested that the point involved relates solely to the right of the jury to know the full effect under the law of their verdict in the event the defense of insanity should be sustained, and not the question, as considered and determined by the majority, whether the jury should know the penalty, if any, under such circumstances. As instructed, they received but a part of the law respecting the defense of insanity applicable to such cases. They

had no means of knowing whether the accused, if found a maniac, should be turned loose upon the community with the probability of his again committing a like crime, or whether it was within the power of the court to consider the verdict, and be governed accordingly. It was not asked that the court indicate what course it would pursue, but what course, under the law, could be taken.

In *State v. Cody*, 18 Or. 506, 521 (23 Pac. 891; 24 Pac. 895) the court had under consideration the giving of instructions not requested, while here the instruction not given was demanded by the defendant and the language to have been intended by way of argument only. The defense of insanity under Section 1393, B. & C. Comp., must be proved beyond a reasonable doubt, and, when relied upon, must be considered in connection with Section 1424 of the Code, which provides the course to be pursued in such cases. Section 16, Article I, of the Constitution clearly contemplates that the jury should be fully instructed as to the law, and as to the practice whether this was intended to be imperative only in the event it is requested by the defense under the record in this case becomes unimportant. It needs no argument to demonstrate that where a man has committed what appears to the jury to be a deliberate murder, if they should believe a verdict of not guilty on account of insanity would turn him at large upon the public it would materially affect their determination of the cause. The court should therefore inform the jury that such a verdict may not necessarily so result, and that under the law it is a matter for the court to determine whether his running at large would endanger public peace and safety. This would in no sense be stating to the jury what the penalty would be, or what the court would do under such circumstances; nor is such the import of the requested instruction. Since the law

requires the insanity to be established beyond a reasonable doubt, unless the jury is fully enlightened as to the law bearing on the subject, this defense, however insane may be the accused, becomes indirectly eliminated. Jurors are not presumed to know the law governing the issues presented. If they were, instructions would probably not be required. I am of the opinion that the constitution intended that the jury should be sufficiently apprised of every phase of the law governing the case as would enable them fully to determine the course they should pursue under the evidence adduced at the trial. This was not done in this case.

Believing that the defendant has been deprived of his constitutional and statutory rights in this respect, I therefore dissent from the conclusions announced by the majority, and think the judgment of the court below should be reversed, and a new trial ordered.

Argued March 16, decided June 1, rehearing granted August 24, reargued October 5, former opinion approved October 12, 1909.

STATE v. ATWOOD.

[102 Pac. 295; 104 Pac. 195.]

HOMICIDE—MANSLAUGHTER IN COMMITTING ABORTION—CONSTRUCTION OF STATUTE—ELEMENTS OF CRIME—"PREGNANT WITH CHILD"—"IN CASE OF THE DEATH OF SUCH CHILD."

1. Section 1748, B. & C. Comp., provides that, if any person shall administer to any woman pregnant with a child any medicine, drug, or any substance whatever, or shall use or employ any instruments, or other means, with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of such mother, such person shall, in case the death of such child or mother be thereby produced, be deemed guilty of manslaughter. *Held*, that the term "pregnant with child" as used therein designates the fetus throughout the period of gestation, and the term "in case of the death of such child," which constitutes the consummation of the crime, equally with the death of the mother, would seem to mean the death of the fetus either before or after quickening.

WORDS AND PHRASES—"EN VENTRE SA MERE."

2. The term "*en ventre sa mere*" comes clearly within the description "a child living at the time of its father's death."

WORDS AND PHRASES—"POSTHUMOUS CHILD."

3. A "posthumous child" is *in esse* from the time of its conception.

NUISANCE—LOCATION AND PUBLICITY.

4. There are some nuisances in which the act complained of may be wrongful, but constitutes a nuisance only by means of its location or publicity, and there may be an act or condition that is rightful, or even neces-

sary, but which may become a nuisance by the same means, but there is also a class of nuisances arising from the use of real property, and from one's personal conduct, that are such *per se* irrespective of their location or publicity.

NUISANCE—CRIMINAL OFFENSE—KEEPING "MATERNITY HOSPITAL" FOR ABORTIONS.

5. Section 1980, B. & C. Comp., generally known as the "nuisance statute," provides that if any person shall willfully and wrongfully commit an act which grossly injures the person or property of another, or grossly disturbs the public peace or health, or openly outrages public decency, and is injurious to public morals, he shall be punished, etc. *Held*, that the acts complained of in an indictment thereunder, charging the establishment and maintenance of a public "maternity hospital" for willfully, wrongfully, and unlawfully committing, producing, and procuring abortions, and of having willfully and wrongfully committed abortions therein, openly outrage public decency, are injurious to public morals, and constitute a nuisance, though they are not performed in a public place, and though they do not disturb the peace or quiet of the community or the public.

NUISANCE—KEEPING MATERNITY HOSPITAL FOR ABORTIONS—REQUISITES OF INDICTMENT.

6. The offense of one who is guilty of a nuisance in keeping a maternity hospital for committing abortions relates to the business or condition, and an indictment therefor need not allege that the acts of defendant in producing abortions were done in cases where the operation or procurements were unnecessary, though if there was a statute authorizing the procuring of abortions in certain cases, it might be necessary to negative such exceptions.

INDICTMENT AND INFORMATION—DESCRIPTION OF OFFENSE NEGATING EXCEPTIONS IN STATUTE.

7. An indictment must negative exceptions in the statutory description of an offense charged.

INDICTMENT AND INFORMATION—DUPLICITY—NUISANCE—OTHER OFFENSE INCLUDED IN CHARGE.

8. An indictment, under Section 1980, B. & C. Comp., for a nuisance in keeping a "maternity hospital" for abortions, charged in connection therewith that defendants in such place, on a specified date, "did willfully and wrongfully commit and produce an abortion upon one M. R., the said M. R. then and there being a woman pregnant with child," and that they also did then and there between certain dates "willfully and wrongfully commit and produce, upon women then and there pregnant with child, the names and number of which are to the grand jury unknown, abortions, contrary to the statute," etc. *Held*, that these allegations of abortions did not state facts constituting a crime, under Section 1748, relating to manslaughter in committing abortions, and were not intended to, but were only allegations of acts done in performance of the purpose charged, which are necessary elements of the nuisance, and do not charge separate offenses.

(MR. JUSTICE KING dissenting.)

(MR. JUSTICE SLATER concurring in dissent.)

From Multnomah: JOHN B. CLELAND, Judge.

C. H. Atwood and C. H. T. Atwood were jointly indicted by the grand jury of Multnomah County, Oregon, for the crime of committing an act grossly disturbing the public peace and health, openly outraging public de-

cency and injurious to public morals. A verdict of guilty as charged in the indictment was returned by a jury, and from a judgment sentencing defendants to imprisonment in the county jail for Multnomah County, defendants appeal.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. Marion B. Meacham*.

For the state there was a brief with oral arguments by *Mr. Andrew M. Crawford*, Attorney General; *Mr. George J. Cameron*, District Attorney, and *Mr. J. H. Page*, Deputy District Attorney.

MR. JUSTICE EAKIN delivered the opinion of the court.

Defendants were indicted by the grand jury of Multnomah County for the crime of committing an act grossly disturbing the public peace and health, openly outraging public decency, and injurious to public morals; the charge being in the following language:

"That the said C. H. Atwood and C. H. T. Atwood on the 1st day of January, 1908, then and there unlawfully conspiring, confederating and agreeing with each other thereto, did on said day, in the said county and state, willfully and wrongfully set up, equip, furnish with apparatus, and thence continuously until the 1st day of November, 1908, keep and maintain a certain public house and public place, known as a 'maternity hospital,' with the intent and purpose of them, the said C. H. and C. H. T. Atwood, of willfully, wrongfully and unlawfully committing, producing and procuring abortions in said house and place upon women pregnant with child, and so having set up, furnished, equipped, kept and maintained the said house and place with the intent and for the purpose aforesaid, the said C. H. T. Atwood and C. H. Atwood, on the 4th day of September, 1908, in the said public house and place, known as the 'maternity hospital' aforesaid in the said county and state, did willfully and wrongfully commit and produce an abortion upon one Mahala Roberts, she, the said Mahala Roberts, then and there being a woman pregnant with child, and

did then and there, between the said 1st day of January, 1908, and the said 1st day of November, 1908, willfully and wrongfully commit and produce upon women then and there pregnant with child, the names and numbers of which women are to the grand jury unknown, abortions, contrary to the statutes," etc.

The defendants were tried thereon, and a verdict of guilty returned against them, and judgment and sentence pronounced against them thereon, from which this appeal is taken.

1. But one question is raised by the assignments of error, namely, "that the indictment upon which defendants were arraigned and convicted does not state facts sufficient to constitute a misdemeanor or crime"; defendants urging, first, that the acts were lawful acts, and were not exercised in such a manner as to openly outrage public decency, or be injurious to public morals; second, that the intent and purpose charged, unless followed by a public act, does not constitute a public nuisance; third, that no facts are alleged showing an unlawful abortion; fourth, that it is not unlawful to produce an unnecessary abortion, unless the woman is quick with child. Defendants' counsel insists that the facts alleged do not constitute a crime, because it is not alleged that the abortions were committed upon women quick with child, contending that otherwise producing abortions is lawful. Much of his argument is based upon this assumption, and he assumes that a necessary element in a violation of Section 1748, B. & C. Comp., defining manslaughter by producing abortion, is that the woman be quick with child, and this view seems to be quite prevalent. This question has never been before this court for decision, and the writer of this opinion is not able to accept defendants' view. It seems to be an unsettled question whether producing an abortion was an offense at common law, except when the mother was quick with child. It is said in *State v. Cooper*, 22 N. J. Law, 52 (51 Am. Dec. 248) that there does not

appear to have been any adjudication upon this point in England, and the judge in that case holds that, unless the mother was quick with child, an abortion was not an indictable offense at common law. To the same effect is *Mitchell v. Commonwealth*, 78 Ky. 204 (39 Am. Rep. 227; *Commonwealth v. Bangs*, 9 Mass. 387; *Smith v. State*, 33 Me. 48 (54 Am. Dec. 607). But in *Mills v. Commonwealth*, 13 Pa. 633, it is held that at common law the offense was punishable, whether committed before or after the woman became quick. This view was approved and followed in *Wells v. New England Life Ins. Co.* 191 Pa. 207 (43 Atl. 126; 53 L. R. A. 327; 71 Am. St. Rep. 763). This is Wharton's view, also, in his *Criminal Law* (Sections 1220-1228). The opinion in *Mills v. Commonwealth*, 13 Pa. 633, is quoted with approval, and followed in *State v. Slagle*, 83 N. C. 632, and the opinion in *State v. Cooper* says that 1 Russell, *Crimes* (2 Eng. ed.) 540, and Roscoe's *Criminal Evidence*, 190, recognize the same view, and 3 Chitty's *Criminal Law*, at page 798, gives some precedents and forms which seem to sustain that view. However, this discussion relates to the offense of abortion at common law, not particularly pertinent to the interpretation of Section 1748, B. & C. Comp., except possibly in so far as it may aid in ascertaining the full meaning of the term "pregnant with child," which does not seem to be ambiguous. That section provides that "if any person shall administer to any woman pregnant with a child any medicine, drug, or substance whatever, or shall use or employ any instruments or other means, with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of such mother, such person shall, in case the death of such child or mother be thereby produced, be deemed guilty of manslaughter." In prosecutions under this statute, if such act resulted in the death of the mother, this court only required proof of pregnancy, and not that she was quick

with child (*State v. Clements*, 15 Or. 237; 14 Pac. 410), and I believe no one will contend to the contrary; and to sustain such a construction the term "pregnant with child," as used in that section, designates the foetus throughout the period of gestation. The term, "in case of the death of such child," which constitutes the consummation of the crime equally with the death of the mother, would seem to mean the death of the foetus, either before or after quickening. This is the view of the court in *State v. Dickinson*, 41 Wis. 309, under a statute identical with ours.

2. There is nothing lacking in this statute (Section 1748) that requires a reference to the common law to aid in its interpretation. It specifically sets out the acts which shall constitute the crime. The common law recognizes the civil rights of an "unborn child," regardless of the stage of gestation. "An infant *en ventre sa mere*, or in its mother's womb, is supposed in law to be born for many purposes * * and in this point the civil law agrees with ours." "Those who are in the womb are considered by civil law to be, in the nature of things, as they are capable of being benefited": 1 Blackstone, Comm. 130n; 1 Coke's Litt. 100a; 2 Coke's Litt. 244a. The term, "*en ventre sa mere*," comes clearly within the description, "a child living at the time of its father's death": *Stedfast v. Nicoll*, 3 Johns. Cas. (N. Y.) 18; *Barker v. Pearce*, 30 Pa. 173 (72 Am. Dec. 691); *Thelluson v. Woodford*, 4 Ves. Jr. 227. See Wharton, Crimes, §§ 1220-1228, as to when life begins.

3. A posthumous child is *in esse* from the time of its conception: *Pearson v. Carlton*, 18 S. C. 47; 6 Words and Phrases, 5475; 2 Words and Phrases, 1127. In regard to descent, our statute, Section 5590, B. & C. Comp., provides that a posthumous child shall be deemed living at the death of its parent. To the same effect is Section 5554, relating to an unborn child not named in the will,

which includes the whole time after conception: *Northrup v. Marquam*, 16 Or. 173 (18 Pac. 449). And it would seem that "pregnant with child," as used in Section 1748, can bear no other construction. But we do not deem a decision of that question necessary to a disposition of this case, and therefore proceed without deciding it.

4. The indictment does not attempt to charge a violation of any statute in the procuring of abortions mentioned. Section 1930, B. & C. Comp., upon which this indictment is drawn, provides that "if any person shall willfully and wrongfully commit any act which grossly injures the person or property of another, or which grossly disturbs the public peace or health, or which openly outrages the public decency and is injurious to public morals, such person, if no punishment is expressly prescribed therefor by this Code, upon conviction thereof, shall be punished," etc. This section, generally known as the "nuisance statute," has been three times construed recently by this court, in *State v. Nease*, 46 Or. 433 (80 Pac. 897); *State v. Ayers*, 49 Or. 61 (88 Pac. 653: 10 L. R. A. (N. S.) 992: 124 Am. St. Rep. 1036), and *State v. Waymire*, 52 Or. 281 (97 Pac. 46). In the first case it is held that it "was evidently intended to cover such offenses against the public peace, public health, common decency and public morals, and such as grossly injure the person or property of another, which are not otherwise made punishable by the Code," and that whatever could have been punished at common law as injurious to public morals may now be punishable under Section 1930, if not made punishable by the Code, so that it is not essential that the acts complained of be declared by the Code to be crimes. In that case the acts complained of were not crimes under the statute, nor at common law. There are some nuisances in which the act complained of may be wrongful, but constitute a nuisance only by reason of its location or publicity, and there may be an act

or condition that is rightful, or even necessary, but may become a nuisance by reason of its location or publicity. But there is also a class of nuisances arising from the use of real property, and from one's personal conduct, that are such *per se*, irrespective of their location or publicity. 1 Woods, Nuisances, §§ 23, 24, says of acts that are nuisances *per se*: "And the existence of which only need to be proved in any locality, whether near to, or far removed from cities, towns, or human habitations, to bring them within the purview of public nuisances. This latter class are those intangible injuries which affect the morality of mankind, and are in derogation of public morals and public decency." Section 24: "Wrongs *malum in se*. This class of nuisances are of the aggravated class of wrongs that, being *malum in se*, the courts need no proof of their bad results, and require none. The experience of all mankind condemns any occupation that tampers with the public morals, tends to idleness and the promotion of evil manners, and anything that produces that result finds no encouragement from the law, but is universally regarded and condemned by it as a public nuisance." See also Section 27. In *Reaves v. Territory*, 13 Okl. 397 (74 Pac. 951): "It is enough to show that the practices indulged in are unlawful and destructive of public morals. No person has a right to carry on, upon his own premises or elsewhere, for his own gain or amusement, any public business clearly calculated to injure and destroy public morals." In *Rex v. Curl*, 11 Strange, 788, it is said, quoting from Lord Chief Justice HALE: "I do not insist that every immoral act is indictable, such as telling a lie, or the like; but, if it is destructive of morality in general, if it does, or may, affect all the king's subjects, it then is an offense of a public nature." And in *Commonwealth v. Shorplless*, 2 Serg. & R. (Pa.) 91 (7 Am. Dec. 632), which was a prosecution for the exhibition of an obscene picture as a common law

nuisance, in determining whether that act was a public nuisance the judge recognizes the case of *King v. Curl*, 11 Strange, 788, as laying down the rule that whatever tended to corrupt society was held to be a breach of the peace and punishable, adding:

"Hence it follows that an offense may be punishable, if in its nature and by its example it tends to the corruption of morals, although it be not committed in public. * * Curl was convicted of selling a book. It is true the indictment charged the act to have been in a public shop, but that can make no difference; the mischief was no greater than if he had taken the purchaser in a private room and sold him the book there. The law is not to be evaded by an artifice of that kind. If the privacy of the room was a protection, all the youth of the city might be corrupted by taking them, one by one, into a chamber, and there inflaming their passions by the exhibition of lascivious pictures. In the eyes of the law this would be a publication, and a most pernicious one."

5. In referring to the fact that unnecessary abortions are *malum in se*, and tamper with the public morals, Dr. Storer quotes with approval from another writer: "But abortion, besides being a direct crime against a positive law of God, is also an indirect crime against society. Admit its practice and you throw open a way for the most unbridled licentiousness": Criminal Abortion, page 73. And that it tends to loose morals and habits among the unmarried. Wharton, Crim. Law (7 ed.) § 1226, in a review of this whole subject, speaking of its moral effect, says: "But if the common law, in making foeticide penal, had in view the great mischief which would result from even its qualified toleration, *e. g.*, the removal of the chief restraint upon illicit intercourse, and the shock which would thereby be sustained by the institution of marriage and its incidents, we can have no authority now for withdrawing any epoch in gestation from the operation of the principle. Certainly the restraints upon illicit intercourse are equally removed; the inducements to

marriage are equally diminished; the delicacy of the woman is as effectually destroyed, no matter what may be the period chosen for the operation." And clearly the acts complained of in this indictment are injurious to public morals, and we conclude that such acts constitute a nuisance, although not performed in a public place, or may not disturb the peace or quiet of the community or the public. They do openly outrage public decency, and are injurious to public morals, and such is the effect of the acts charged, even though not done in a public place, or in view of the public: 1 Wood, Nuisances, § 23. It is said in *Commonwealth v. Shorpless*, 2 Serg. & R. (Pa.) 91 (7 Am. Dec. 632), a prosecution for common law nuisance in the exhibition of an obscene picture in a certain house, "that the offense may be punishable, if in its nature and by its example it tends to the corruption of morals, although it be not committed in a public place."

6. It is not necessary to allege that the acts of defendants in producing abortions were done in cases where the operations or procurements were unnecessary. The offense relates to a business or condition. If we had a statute authorizing the procuring of abortions in certain cases, it might be necessary, in an indictment in such a case as this, to negative such exceptions, but we have no such statute.

7. If this were a prosecution under a criminal statute and in the description of the offense certain exceptions are made, then such exceptions must be negatived in the indictment: *State v. Tamlar*, 19 Or. 528 (25 Pac. 71; 9 L. R. A. 853). But the business of wrongfully and unlawfully committing and producing abortions can have no reference to, nor include instances in, the legitimate practice of medicine, in which an abortion may be necessary and lawful, and the charge of this offense need not negative such cases.

8. The charge is that the house was maintained with the intent and purpose of willfully, wrongfully and unlaw-

fully producing abortions. It was not the purpose of the indictment to charge that the intention of the defendants was to commit the crime of killing by producing abortions under Section 1748, B. & C. Comp., but that they were conducting a business that openly outraged the public decency and was injurious to public morals, and the business with which the defendants are charged clearly comes within those terms. Evidently it was for the purpose of condemning such a business that Congress enacted Section 2491, U. S. Rev. St. (22 Stat. 489), in which it classes "drugs and medicines for the prevention of conception, or for causing the unlawful abortion" with obscene pictures and other articles of an immoral nature, the importation of which is prohibited, and the articles made subject to seizure and forfeiture, and many authorities treat such acts as wrongful and those who make a practice of producing abortions are referred to as abortionists. Dr. Storer says the number and success of professed abortionists are notorious, and among others, of those who are accomplices with the mother in these cases he classes quacks and professed abortionists, druggists, and "worst of all, though fortunately extremely rare, physicians in regular standing." He says, at page 60, "that the public prints, the National Medical Association, and the profession have drawn the attention of the community to the melancholy frequency and comparative impunity which marks the practice of abortionists," and this is the conduct and business with which the indictment charges defendants, "with intent and purpose" of willfully, wrongfully and unlawfully committing, producing and procuring abortions in said house and place upon women pregnant with child.

The allegations of abortion upon Mahala Roberts and other women do not state facts that constitute a crime under Section 1748, B. & C. Comp., and are not intended to, but are only allegations of acts done in the perform-

ance of the purpose and intent charged, which are necessary elements of the nuisances, and do not charge separate offenses: *State v. Waymire*, 52 Or. 281 (97 Pac. 46).

From the foregoing statements of the law we conclude that the acts charged against defendants were not lawful, neither authorized by law, nor morally right, but constitute a nuisance *per se*, and therefore need not be shown to be performed in a public place, and we conclude that the acts charged in the indictment are sufficient to constitute a nuisance under Section 1930, B. & C. Comp.; and the judgment of the court is affirmed.

MOORE, C. J., concurs in the foregoing opinion. Justice BEAN has retired from the bench since the trial of this cause, and, as Justices KING and SLATER dissent from the conclusions reached, therefore a majority of the court are unable to agree upon a decision, from which it follows that the judgment must be affirmed.

AFFIRMED.

MR. JUSTICE KING delivered the following dissenting opinion:

I am unable to concur in the conclusion announced in the majority opinion in the foregoing action. However, as to the first point there considered, concerning the particular moment when pregnancy with child may, under the statute, be deemed to exist, I shall express no opinion. A decision upon this point is not essential to a determination of the merits of the cause, and, as observed on the same point in *State v. Dunn*, 53 Or. 304 (100 Pac. 258), should be reserved for future consideration, especially so in view of the fact that in the case cited, as well as in the one under consideration, each of the counsel for the respective parties to the controversies conceded that the use of the words "pregnant with child," so far as any prosecution under Section 1748, B. & C. Comp. is concerned is synonymous with the expression "quick with child," and that the same rules of law are applicable

thereto. It is well to observe, however, that, according to the views expressed by the writer of the majority opinion, foeticide constitutes manslaughter without any reference to the period of gestation. Assuming this position to be a correct exposition and application of the law, it follows that defendants could only have been prosecuted for manslaughter, and are not subject to a criminal prosecution under Section 1930, B. & C. Comp., for that section expressly limits prosecutions under it to instances where "no punishment is expressly provided therefor by the Code." In *State v. Nease*, 46. Or. 433 (80 Pac. 897) it is stated and quoted with approval in the majority opinion in the case under consideration, that this section of the statute was evidently intended to cover such offenses against the public peace, public health, common decency and public morals, and such as grossly injure the person or property of another, as are not otherwise made punishable by the Code, and, as there further indicated, only such acts as were punishable by the common law may now be punishable under Section 1930, if not otherwise punishable by the Code. For a similar application by this court of this rule to another act, see *State v. Eisen*, 53 Or. 297 (99 Pac. 282: 100 Pac. 257), where it is held that it was not intended by the statute there under consideration to provide either additional methods of prosecuting crimes, nor cumulative penalties, for the prosecution and punishment of which provisions have otherwise been made by the statute. If, therefore, the first position taken in the opinion is sound, the conclusion announced as to the sufficiency of the indictment under Section 1930, B. & C. Comp., must, as a logical sequence, be rejected. I think, however, that, independent of the above feature, the indictment is insufficient to sustain a conviction of any crime known to our statute. The language of the Code attempts no specific definition of the offense herein sought to be established. Only broad and

general terms are used, leaving the acts which may come within its provisions to be sufficiently averred; and the rule is elementary that an indictment is not sufficient, though it charges the offense in the exact language of the statute, either where the words of the statute do not embrace a definition of the offense, or the acts themselves are not unlawful. Pleadings coming within such rule are necessarily limited to instances where the statute sufficiently sets out the facts constituting the offense, so that the defendant may have notice of that of which he is charged. Nothing can be left to implication, intendment or conclusion: 10 Enc. Pl. & Pr. 487, 503; 22 Cyc. 335; *State v. Packard*, 4 Or. 157; *State v. Perham*, 4 Or. 188; *Latimer v. Tillamook Co.* 22 Or. 291 (29 Pac. 734).

As stated by Mr. Justice WALDO, in *State v. Smith*, 11 Or. 207 (8 Pac. 343), "An indictment must be so drawn as to exclude any assumption that the indictment may be proved and the defendant still be innocent." The section under which this prosecution is brought contains no specific reference to the class of acts attempted to be charged against the accused, thereby making it impossible to charge the offense in the language of the statute. The only averments tending to bring the charge within the statute are that the defendants did wrongfully, unlawfully and contrary to the statutes, equip and maintain a certain house and place, known as a "maternity hospital," for the purpose of producing abortions upon women pregnant with child. The words "wrongful, unlawful, and contrary to the statutes in such cases made and provided" are statements of conclusions only: *State v. Stroud*, 99 Iowa, 16 (68 N. W. 450). Take from the indictment these words, and it will be found that the defendants are merely charged with intentionally maintaining a "maternity hospital" where abortions were produced upon various women, including one Mahala Roberts. Nothing appears within the charge to indicate that the

acts complained of were committed at such hospital, other than under such circumstances as might be necessary for the preservation of the lives of such women as may be treated there; and surely we cannot, merely by intendment or implication, charge defendants with the acts essential to bring the conduct within the criminal statute. This can only be accomplished by treating the words "wrongful, unlawful and contrary to the statutes" as being sufficient for that purpose, for the statute makes abortions a crime, and the commission of which could be in conflict with Section 1930 of the Code only where not performed for the purpose of preserving the life of the person pregnant. Sufficient facts should be stated from which it could be determined whether the acts complained of were wrongful or in violation of any of the provisions of the statute; otherwise it is obvious that defendants could plead guilty to every statement in the indictment and still not be subject to punishment under the Code.

The majority opinion holds that "if we had a statute authorizing the procuring of abortions in certain cases, it might be necessary, in an indictment in such a case as this, to negative such exceptions, but we have no such statute." This statement overlooks the fact that the common law, as well as all statutes bearing on the subject, recognize the right to commit abortions in certain cases, such as to preserve the life of the mother, etc. Indeed, Section 1748 of the Code, quoted in the opinion, contains this exception. It cannot, then, be said that abortions are either *malum in se* or a nuisance *per se*: 21 Am. & Eng. Enc. Law (2 ed.) 683; 14 Pl & Pr. 1098. Hence, under the most unfavorable view possible, it could only be such as are unnecessary and which may be committed for immoral purposes, that may come within the *malum in se*, or nuisance *per se* rule; and every rule of pleading requires that, to bring the accused within the

charge of making a business of engaging in any unnecessary or immoral acts of any kind, the facts must be stated in the indictment or information showing such condition, and not merely the conclusion that the acts were wrongful or unlawful. In *State ex rel v. Malheur County Court*, 54 Or. 255 (101 Pac. 907) this court, in an opinion by Mr. Justice MCBRIDE, in construing an averment there under consideration that "no notice was ever issued or posted as by law provided," holds that "the words 'as by law provided' make the allegation a mere statement of a conclusion of law," further observing: "It is equivalent to saying that, in the pleader's judgment, there was something in the manner or time of posting, or in the substance of the notices, that rendered them invalid. There was, therefore, no question of fact to be tried by the court." Although that was a mandamus proceeding, the reasoning there invoked applies with equal force to the case in hand. The mere assertion that the acts of defendant were "wrongful, unlawful and contrary to the statutes," etc., amounts only to a declaration that in the opinion of the grand jury the abortions committed, and maintenance of equipments and a building therefor, was in violation of law and a menace to the public, etc., which, without stating the facts from which such conclusion is deduced, states no issuable facts upon which the accused may be tried.

The charge intended by the indictment is a criminal charge; and, while it refers to the business affairs in which the accused may be engaged, the manner in which it is intended to allege the business was conducted is criminal in character, and the defendants were convicted accordingly, and, as recently held by this court in *State v. Eisen*, 53 Or. 297 (100 Pac. 257), and numerous other authorities there cited from this court, "an information or indictment must negative such exceptions as are expressly or impliedly included in the stat-

ute under which the charge against the accused may be preferred." This does not mean that the exception must be contained in the particular section of the statute under which the charge is preferred, but the statute is to be taken and considered as a whole, and was so applied and recognized in the case last cited. Applying the statute in the most favorable light possible to the state, there must be read with Section 1930, B. & C. Comp., a further statement that the conducting of a hospital for the procuring of unnecessary abortions shall be deemed to come within the provisions thereof, making the negating of the exceptions (or statements of facts showing such operations to have been unnecessary) essential to the sufficiency of an indictment filed under such section.

I feel compelled, therefore, to dissent from the conclusion reached by the majority, and think the indictment clearly insufficient to sustain the judgment of conviction of defendants, and that the judgment of the lower court should be reversed.

MR. JUSTICE SLATER concurs in this dissent.

Decided October 12, 1909.

ON REHEARING.

[104 Pac. 196.]

Statement by MR. JUSTICE MCBRIDE.

This case was argued and submitted during the March term, 1909. MR. JUSTICE BEAN having retired from the bench after the argument and before the decision, and the remaining four members of the court being equally divided in opinion as to what judgment ought to be rendered, the case, under the statute, stood affirmed. A re-examination before a full bench being considered desirable, a rehearing was granted. AFFIRMED.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

For the reasons stated by MR. JUSTICE EAKIN in his opinion, I am of the opinion that the judgment of the court below should be affirmed. As to the question whether producing an abortion upon a woman not quick with child is a violation of Section 1748, B. & C. Comp., I express no opinion, as I do not consider that it arises in this case, and do not wish to be understood as either dissenting from or concurring with the views of MR. JUSTICE EAKIN on that subject. In all other respects I agree with his views. As a majority of the court now concur in the result reached in MR. JUSTICE EAKIN'S opinion, the judgment will be affirmed. **AFFIRMED.**

JUSTICES KING and SLATER adhere to their former dissenting opinion.

Argued on motion to dismiss July 27, decided October 12, 1909.

ZELIG v. BLUE POINT OYSTER CO.

[104 Pac. 198.]

STATUTES—CONSTRUCTION—AMENDMENT.

1. An amendment is to be construed as if incorporated in the original act at the time enacted, and no clause is to be left inoperative.

FORCIBLE ENTRY AND DETAINER—REVIEW—ADDITIONAL UNDERTAKING.

2. Section 5748, B. & C. Comp., declares that the rules of practice governing actions generally in a justice's court shall yield to the special procedure provided for forcible detainer. Section 5754 provides that no appeal shall be taken by defendant in forcible detainer until he shall in addition to the undertaking required by law upon appeal, give an undertaking for the payment to plaintiff of twice the rental value of the property of which restitution shall be adjudged. Act February 23, 1907 (Laws 1907, page 132), amends Section 5746, B. & C. Comp., so as to confer concurrent jurisdiction on the circuit court in forcible detainer with a justice's court. *Held*, that the special procedure provided for forcible detainer is not confined to a justice's court, but applies in the circuit court to the exclusion of the usual procedure there, and that the additional bond required by Section 5754 must be given in an action brought in the circuit court as well as if brought in a justice's court.

FORCIBLE ENTRY AND DETAINER—REVIEW—PERMISSION TO FILE OMITTED UNDERTAKING.

3. Section 549, subd. 4, B. & C. Comp., providing that where a party gives notice of appeal, and thereafter omits, through mistake, to do any other act, including the filing of the undertaking required by that section, necessary to perfect the appeal or stay proceedings, he may be permitted to amend or perform such act, does not empower the Supreme Court to permit to be filed the additional undertaking for an appeal required by Section 5754 in unlawful

detainer, as it is a condition precedent to the appeal, and in addition to, and not a substitute for, the undertaking required by Section 549.

From Multnomah: ROBERT G. MORROW, Judge.

This is an action of forcible entry and detainer by M. A. Zelig against the Blue Point Oyster Co. and Sam Mackin. From a judgment in favor of plaintiff, defendants appeal. Plaintiff now moves to dismiss the appeal.

DISMISSED.

Mr. Julius Silvestone for the motion.

Mr. Claude Strahan, contra.

MR. JUSTICE SLATER delivered the opinion of the court.

On December 26, 1908, in an action of forcible entry and detainer brought in the circuit court of Multnomah County under the provisions of Chapter 18, Title 63, Code, as amended by the act of February 23, 1907 (Laws 1907, p. 132), plaintiffs obtained a judgment against defendants for the restitution of certain store premises in the City of Portland. Defendants gave an oral notice of appeal, and on December 29, 1908, attempted to perfect their appeal by serving and filing an undertaking as required by Section 550, B. & C. Comp., with a provision for stay of proceedings, substantially in compliance with the provisions of subdivision 2 thereof; but they omitted the giving or filing of an additional undertaking required by Section 5754, B. & C. Comp., which section is a part of the original forcible entry and detainer act under which the action was brought.

1. Plaintiff has moved to dismiss the appeal and to affirm the judgment, assigning several reasons therefor. We find it unnecessary, however, to refer to any but the fifth, as that in our opinion is fatal to the jurisdiction of this court, and necessitates the dismissal of the appeal. The fifth assignment refers to the failure to give the additional undertaking. The original forcible entry and detainer act of 1866 (Laws 1866, p. 31), comprehended in Sections 5745-5761, inclusive, B. & C. Comp., conferred

upon the justices' courts jurisdiction of actions originating thereunder, and provided the particular procedure to be followed. Section 5754 is as follows:

"If judgment be rendered against the defendant for the restitution of the real property described in the complaint, or any part thereof, no appeal shall be taken by the defendant from such judgment until he shall, in addition to the undertaking now required by law upon appeal, give an undertaking to the adverse party, with two sureties, who shall justify in like manner as bail upon arrest, for the payment to the plaintiff of twice the rental value of the real property of which restitution shall be adjudged, from the rendition of such judgment until final judgment in the said action, if such judgment shall be affirmed upon appeal."

By the act of February 23, 1907 (Laws 1907, p. 132), Section 5746, B. & C. Comp., was so amended as to confer concurrent jurisdiction upon the circuit court for the trial of such causes. No other change in the law was made; and the question at once arises whether the special procedure therein provided is to apply and control in the trial of such actions when brought in the circuit court, to the exclusion of the usual procedure there, or is such special procedure to be confined to the justice's court. Actions of forcible entry and detainer are of the nature of special proceedings, and are in most instances not affected by provisions relating to actions generally. But the rules of practice acts and other general laws usually apply where it is not otherwise decreed. 9 Enc. Pl. & Pr. 47. Section 4 of the original act, which is Section 5748 of the Code, provided that "such action, except as hereinafter specially provided, shall be conducted in all respects as other actions before justices of the peace." This is an express declaration that the general rules of practice governing actions generally in that court must yield to the special provisions of the act, and, when by subsequent amendment of one of the sections of that act the same jurisdiction was conferred upon the circuit courts, it

carried with it the express restrictions contained in other parts controlling the exercise of that power. To arrive at the legislative intent, the whole act must be read with the amendment as if it were a part thereof at the time it was first enacted. An amendment is to be construed as incorporated in the original act, and as a part thereof, and no clause is to be left inoperative. 26 Am. & Eng. Enc. Law (2 ed.), 712; *State v. Fisher*, 53 Or. 38 (98 Pac. 713, 715). It is argued, however, by defendants' counsel that by the amendment of 1907, the expressed intent of the legislature was merely to confer on the circuit court jurisdiction of the "action to recover possession of premises," quoting the heading of the amended section as it first appears in the Code (Section 5746, B. & C. Comp.), which heading was not a part of the original act, but was placed there by the compilers as a matter of aid to a quick and easy reference; and it is further contended that, if this were the sole intent of the amendment, it would be without force for the asserted reason that the circuit court always has been vested with jurisdiction of "actions to recover the possession of premises" in all cases covered by the forcible entry and detainer act, and that such actions were conducted with reference to the procedure prevailing in circuit courts. In support of this contention, reference has been made to section 17 of the act, which provides that:

"In any action to recover the possession of real property, as provided for in Chapter 1 of Title V of the Code of Civil Procedure, notice to quit, when necessary, may be given as prescribed in this chapter; and nothing in this chapter shall be construed so as to prevent such action being maintained for the recovery of the possession of real property, although the entry of the defendant be forcible, or his holding unlawful and with force." Section 5761, B. & C. Comp.

Chapter 1 of Title 5 of the Code covers the procedure relating to actions of ejectment, and requires the complainant to set forth the nature of his estate in the

property, whether it be in fee for life, or for a term of years, but as an incident thereof the right of possession is determined, although the entry of the defendant be forcible, or his holding unlawful and with force. He must, however, in order to maintain the action, tender an issue as to title. Construing the act of 1866, now under consideration, it was held by this court in *Thompson v. Wolf*, 6 Or. 308, that the circuit court did not have in the first instance jurisdiction of actions of forcible entry and detainer, but that such jurisdiction was vested in the justice court to the exclusion of the circuit court. Hence, by the amendatory act of 1907, jurisdiction of such actions was conferred upon the circuit court to be exercised under the particular procedure expressly provided in the act amended. The section of the act (Section 5754, B. & C. Comp) requiring the giving of an additional undertaking for an appeal has also been judicially interpreted by this court in *Danvers v. Durkin*, 14 Or. 37 (12 Pac. 60), and the giving of such undertaking held to be a prerequisite to the right of appeal. "This undertaking," says Mr. Chief Justice LORD, "is a special one for rent, and must be given in addition to the undertaking now required by law upon appeal in ordinary cases. The language of the statute is in denial of the right of appeal unless this undertaking is given." This case was approved and followed in *Heiney v. Heiney*, 43 Or. 578 (73 Pac. 1038).

3. No such undertaking having been given, it follows that the appeal must be dismissed, unless this court has power under Section 549, subd. 4, B. & C. Comp., to permit one to be given by them now in response to their cross-motion. The section referred to reads as follows:

"* * * When a party in good faith gives due notice as hereinbefore provided, of an appeal from a judgment, order, or decree, and thereafter omits, through mistake, to do any other act (including the filing of an undertaking as provided in this section) necessary to perfect the appeal or to stay proceedings, the court, or judge thereof,

or the appellate court, may permit an amendment or performance of such act on such terms as may be just."

The power here conferred is expressly confined to such act as may be necessary to perfect an appeal or stay the proceedings, including the filing of the undertaking required by that section, and does not authorize the court to dispense with or supply any of the steps necessary to take the appeal. *Taylor v. Lapham*, 41 Or. 479, 480 (69 Pac. 439). The additional undertaking required to be given by Section 5754, B. & C. Comp., is not an act necessary to perfect an appeal previously initiated by right, but it is a condition precedent to the exercise of the right, and is in addition to, and not a substitute for, the undertaking required by section 549. The giving of such undertaking is just as essential to the jurisdiction of this court as the giving and filing of the notice of appeal, which is the taking of an appeal, and "the statute limiting the time in which an appeal may be taken is mandatory and jurisdictional, and cannot be waived by the court, nor can the court entertain any excuse for not complying with its requirements." *Taylor v. Lapham*, 41 Or. 479, 480 (69 Pac. 439).

The motion to dismiss is therefore allowed.

DISMISSED.

Argued October 7, decided October 19, 1909.

EX PARTE BARNES.

BARNES v. LONG.

[104 Pac. 296.]

HABEAS CORPUS—CUSTODY OF CHILD—DEATH OF MOTHER HAVING CUSTODY.

1. The father, being worthy and capable of properly caring for his child, custody of which on his obtaining a divorce was given to its mother, will as its rightful custodian on her death be given its custody in habeas corpus as against the mother's parents, with whom she left it to take care of and keep.

HABEAS CORPUS—CUSTODY OF CHILD—REMOVAL FROM STATE.

2. A child, custody of which was given its mother on its father obtaining a divorce from her in Washington, and which by permission of the court granting the divorce was taken by her to Oregon, may properly be taken back by its father on his recovering its custody on her death.

From Union: JOHN W. KNOWLES, Judge.

This is a *habeas corpus* proceeding by James R. Barnes against Cora Long to recover the custody of Joseph Lester Barnes, a minor. From a judgment in favor of defendant and dismissing the writ, plaintiff appeals.

REVERSED.

For appellant there was a brief over the names of *Messrs. Cochran & Cochran*, with an oral argument by *Mr. Charles E. Cochran*.

For respondent there was a brief over the names of *Mr. Charles H. Finn* and *Messrs. Ivanhoe & Hodgin*, with oral arguments by *Mr. Finn* and *Mr. Francis S. Ivanhoe*.

MR. JUSTICE EAKIN delivered the opinion of the court.

This is a proceeding by *habeas corpus* to recover the custody of a child, a boy—Joseph Lester Barnes—being at this time two years and four months of age. Petitioner and Ada Barnes, the parents of the child, were married June 10, 1906, and resided in Adams County, Washington, where petitioner owns a large farm. They separated about December 26, 1906, the wife returning to the home of her parents, and thereafter residing with them. On June 10, 1907, the child was born, and on February 15, 1908, in Adams County, Washington, this petitioner secured a decree of divorce from his wife, Ada, on the ground of desertion, the decree giving to the wife the care and custody of the child until such time as the court should order otherwise, and providing that the wife should not remove the child beyond the jurisdiction of that court. Thereafter it was stipulated that the decree of the court should be amended so as to eliminate the provision that the wife shall not remove the child from the jurisdiction of the court. The wife thereafter, with the child, removed to Union County, Oregon, where on October 7, 1908, she died at the home of her mother, this defendant, and requested her mother to take care of the baby and keep him, which she promised to do,

and now refuses to surrender it to petitioner. Soon after the rendering of the decree of divorce, petitioner re-married, and, with his wife, now resides on his farm in Adams County, Washington. The evidence establishes, and the trial court found, that petitioner is a man of good personal habits, has a good reputation for being honest, sober, and industrious, and owns a large farm worth \$10,000, incumbered for a debt of \$2,000.

1. In the decree of divorce, the custody of the child was given to the wife, and properly so, notwithstanding she was the party at fault, such fault not reflecting upon her character, and the child being of tender age. But the law recognizes the father, the mother being dead, as the rightful custodian of his child, as against the claim of all persons. Of course, the court in the interest of the child may take it from the parents and make other provisions for it, but there must be some good cause for so doing. No doubt the defendant would give the child a good home and the best of care, and is very much attached to it, but as against the father she has no legal claim upon it. *Swarens v. Swarens* (Kan.), 97 Pac. 968. If the father were unworthy or incapable of caring for it properly, then it would be the duty of the court to place it elsewhere, but no plea of that character is made here. The divorce suit has not relieved petitioner of his parental obligation to his son, and he has done no act that forfeits his right to its custody. It is said in *Jackson v. Jackson*, 8 Or. 402, that, as between the father and maternal grandfather of a child, the father certainly has the better right to its care and custody, unless he is manifestly an improper person to take charge of it. See, also, *Lambert v. Lambert*, 16 Or. 485 (19 Pac. 459); *Bailey v. Bailey*, 17 Or. 114 (19 Pac. 844).

2. Neither is it improper for petitioner to remove the child out of Oregon, as Washington is its home, and it is a special charge of the superior court of Adams County, Washington, where the court retains a continuing

supervision over it in the divorce suit, and is trustee of \$500 for its benefit.

The court erred in its conclusion of law that the best interests of Joseph Lester Barnes required that he remain in the custody of defendant, and in dismissing the writ, and in not awarding the child to petitioner. Judgment is reversed and the cause remanded to the lower court for such further proceedings as may be proper, not inconsistent with this opinion.

REVERSED.

Argued August 6, decided October 19, 1909.

O'SULLIVAN v. BLAKELY.

[104 Pac. 297.]

REPLEVIN—AFFIDAVIT—CONTENTS.

1. Under Section 286, subd. 4, B. & C. Comp., relating to claim and delivery, and providing that when a delivery is claimed, plaintiff shall make an affidavit that the property has not been taken for a tax, etc., when an immediate delivery is not claimed, such affidavit need not be made.

REPLEVIN—PROPERTY SUBJECT—PROPERTY TAKEN FOR TAX.

2. Under Section 286, subd. 4, B. & C. Comp., relating to claim and delivery, and providing that when a delivery is claimed plaintiff shall make an affidavit that the property has not been taken for a tax, while the provisional remedy of claim and delivery is not entirely co-ordinate with the common-law action of replevin, yet it conforms to the general rule that property seized for a tax on a warrant not void on its face cannot be replevied by the defendant in the tax warrant.

REPLEVIN—PROPERTY TAKEN FOR TAXES—PERSONALTY—DEFECTS IN WARRANT OR LEVY—EFFECT.

3. While a tax warrant, legal in form, proceeding from a court or officer authorized to issue it, and which on its face contains nothing fairly disclosing that it was improperly issued, will protect the officer executing it as if it were valid, it will not enable him to build up a title, either general or special, to property seized thereunder; and hence, when title to property is asserted by an officer undertaking to justify his execution of a tax warrant, he must show his authority, the regularity of the proceedings, and that the property levied on belongs to the person named in the warrant.

TAXATION—SALES—REGULARITY—BURDEN OF PROOF.

4. The sale of property by a tax collector is an *in invitum* proceeding, the regularity of which must be established by the officer attempting to uphold a title pursuant to the sequestration.

REPLEVIN—SALE FOR TAXES—ACTION TO TRY TITLE—ANSWER.

5. In an action to recover the possession of personal property or its value, an answer alleging the seizure and sale of the property under a tax warrant, but not setting forth the several steps required to be taken to form the basis of a valid tax, was insufficient.

From Union: WILLIAM SMITH, Judge.

Statement by MR. CHIEF JUSTICE MOORE.

This action was commenced April 3, 1906, by Peter O'Sullivan against J. M. Blakely, sheriff, to recover the possession of personal property, or its value in case possession thereof could not be secured, and damages for the alleged wrongful taking and the unlawful detention.

The answer denied the material averments of the complaint, and alleged, in effect, that at all the times stated in the pleadings the defendant was the duly elected, legally qualified and acting sheriff of Wallowa County and the *ex-officio* tax collector therein; that on February 12, 1906, the county clerk of that county made his certificate of the several amounts of taxes, apportioned to be assessed upon the taxable property of the county for all purposes for the year 1905, together with a transcript of the original assessment roll, to which was attached a proper warrant, directed and delivered to the defendant, authorizing him to collect the taxes set out in the transcript or tax roll for that year; that on such roll the plaintiff's personal property assessment, as equalized, was \$13,376, and the tax due thereon amounted to \$214.01; that the plaintiff was removing from that county without paying any part of such tax, and had advertised his goods to be sold March 24, 1906, intending thereby to place them beyond the reach of the defendant for such tax; that on the day appointed for such sale the defendant, in order to satisfy the plaintiff's taxes, which were then due, levied on the personal property, and after duly advertising the same, sold it April 7, 1906, to the highest bidder for cash, thereby realizing \$176.85; that such sale was fairly conducted, and the sum so obtained was all the property was then reasonably worth; that after such seizure, but prior to the sale so made, the plaintiff paid on account of such tax the sum of \$30; that the expenses incurred in making the sale were \$29; that after crediting such payment and the sum so secured from the sale, and deducting the expenses, there remained due on

account of the tax the sum of \$36.16; and that the personal property described in the complaint composed the goods, etc., as sold by the defendant.

A demurrer to the answer, on the ground that it did not state facts sufficient to constitute a defense herein, was overruled, whereupon a reply was filed denying the averments of new matter in the answer, upon which issues the cause was tried, resulting in a judgment for the defendant, and the plaintiff appeals. **AFFIRMED.**

For appellant there was a brief over the names of *Mr. George G. Bingham and Mr. Charles H. Finn*, with an oral argument by *Mr. Bingham*.

For respondent there was a brief and an oral argument by *Mr. Francis S. Ivanhoe*.

Opinion by MR. CHIEF JUSTICE MOORE.

1. The seizure of the personal property was made pursuant to the following enactment:

"It shall be the duty of the sheriff to levy upon the goods and chattels of any person or persons removing from the county without first paying all taxes charged against them; and he shall make sale thereof, if necessary, in the manner prescribed in this chapter." Section 3137, B. & C. Comp.

This action is maintained under the code title of "Claim and Delivery" (Section 284, B. & C. Comp.), which form, it has been said, was substantially the common-law remedy of replevin. *Casto v. Murray*, 47 Or. 57, 63 (81 Pac. 388, 883); *Freeman v. Trummer*, 50 Or. 287, 292 (91 Pac. 1077). The plaintiff herein did not claim the immediate delivery of his goods, and hence he was not required to give, and did not make, an affidavit that the property had been taken for a tax. Section 285, subd. 4, B. & C. Comp. The statute last noted practically prohibits the maintenance of the former action of replevin in cases like the one at bar.

2. It will thus be seen that the provisional remedy of claim and delivery is not entirely co-ordinate with the

common-law action of replevin, but it conforms to the general rule established by courts that, where property is seized for a tax upon a warrant not void on its face, such property cannot be replevied by the defendant in the tax warrant from the officer so seizing it. Cobbey, Replevin (2 ed.) § 333.

3. A tax warrant, legal in form, proceeding from a court or an officer having authority to issue it, and which on its face contains nothing fairly to disclose to any one that it was put forth without sanction of law, will protect the officer whose duty it is to execute such process to the same extent as if it were valid; but it will not enable such official to build up a title, either general or special, to property seized by virtue of the mandate. Cooley, Taxation (2 ed.), 801. When, therefore, a title to property is asserted by an officer, who undertakes to justify his execution of a tax warrant, he must, as in cases of seizure under an attachment or under an execution, show his authority, the regularity of the proceedings under which he acts, and that the property levied upon, to satisfy the ratable measure of the sovereign's exaction, belongs to the person named in the warrant. Shinn, Replevin, § 538.

4. The sale of property by a tax collector, for the payment of the tribute which the law demands, is an *in invitum* proceeding, the regularity of which must be established by the officer who attempts to uphold a title pursuant to the sequestration. The amended complaint alleged that at all the times therein stated the plaintiff was the owner, etc., of the personal property, which on March 24, 1906, the defendant unlawfully seized. The complaint does not state, nor does the answer allege, that the plaintiff owned such property in Wallowa County on March 1, 1905, at the hour of 1 o'clock A. M., when the goods should have been assessed to the person who at that time owned them. Section 3057, B. & C. Comp., as amended by Laws Sp. Ses. 1903, p. 4.

5. The answer does not allege that the personal property was listed by the assessor, unless such fact is to be inferred from the averment "that on said tax roll [referring to a transcript of the original assessment roll] the plaintiff's personal property assessment, as equalized by the county board of equalization, was, after his exemption of \$300, \$13,376." As the answer does not set forth the several steps required to be taken to form the basis of a valid tax, it did not aver facts sufficient to constitute a defense to the action, and an error was committed in overruling the demurrer.

For the error so committed, the judgment is reversed, and the cause remanded for such further proceedings as may be necessary, not inconsistent with this opinion.

REVERSED.

MR. JUSTICE EAKIN, having made an order in this cause, took no part in the trial or consideration hereof.

Argued October 5, decided October 19, 1909.

STATE v. LA ROSE.

[104 Pac. 299.]

CRIMINAL LAW—EVIDENCE—OTHER OFFENSES.

1. Defendant was charged with having killed deceased, the proprietor of a secondhand store, by striking him with a gas pipe wrapped in newspaper, as deceased turned to show defendant an article for which he had inquired. Sixteen hours before another secondhand dealer had been struck on the head with a rusty iron bar wrapped in newspaper in the same manner, and twenty-four hours after the attack on deceased, defendant entered a Chinese tailor shop with a rusty piece of gas pipe wrapped in a newspaper and handkerchief, and requested to be shown an article of merchandise from one of the shelves. The Chinaman saw the pipe, and, on inquiry, defendant stated he was working for the gas company. As the Chinaman turned to get the article, defendant struck him with the pipe, but the blow failed to stun him, and he pursued defendant, who, when arrested, stated that he thought he had killed the Chinaman, having knocked over a number of his kind, and did not think the Chinaman would be able to identify him. On it becoming known that some one had killed deceased, who was a Jew, defendant stated, "They ought to kill all the God damned Jews." *Held*, that evidence of the assault committed on the Chinaman and on the storekeeper preceding the assault on deceased was admissible in a prosecution for killing deceased.

CRIMINAL LAW—WITNESSES—INDORSEMENT—IDENTITY.

2. The object of placing the names of witnesses on the indictment being only to identify the person who testified before the grand jury, the descrip-

tion of a witness whose true name was "Thomas Kinney" as "Thomas Leondor" was not objectionable where it appeared that the witness was a member of an acrobatic trio, known as the "Leondor Bros. Trio," that he was also known as "Thomas Leondor," and that he was employed in a saloon known as "Leondor Bros. Saloon."

From Multnomah: ROBERT G. MORROW, Judge.

Statement by MR. JUSTICE MCBRIDE.

Defendant, Jack La Rose, was convicted in the circuit court for Multnomah County of the crime of murder in the second degree, committed in the killing of one Hyman Neuman, and appeals to this court.

The evidence introduced by the State tended to show the following facts: On the 11th day of May, 1908, defendant entered the second-hand store of one Max Hermann, and asked to be shown some article on sale. As Hermann turned to procure it, defendant struck him on the head with a rusty iron bar wrapped in a newspaper. After striking the blow, defendant escaped from the store, leaving Hermann in an unconscious condition, with the weapon lying upon the floor near him. The next day, about 16 hours after the assault upon Hermann, deceased, Hyman Neuman, was found in his second-hand store, which was situated within a block from the store of Max Hermann, lying in an unconscious condition upon the floor, wounded upon the head, in a manner similar to Hermann, with a piece of rusty gas pipe, wrapped in a newspaper bearing date of the previous day, lying near him. A step-ladder against the wall and a suitcase on the floor near him indicated that he had probably been taking the case from the shelf when he was assaulted in the same manner as Hermann. Within 24 hours after the assault on Neuman, and within two blocks of the business places of Hermann and Neuman, defendant entered the Chinese tailor shop of one John Chong with a rusty piece of gas pipe, which was wrapped in a newspaper, and further wrapped in a handkerchief, and requested to be shown an article of merchandise from one of the shelves. The wrapping not being

arranged so as to entirely cover the pipe, the Chinaman saw the pipe and asked him what he was doing with it, and he answered that he was working for the gas company. When the Chinaman turned to take down the article, defendant struck him with the pipe, but the blow was a glancing one, and failed to stun him. Defendant then ran out of the store with the Chinaman in pursuit, and was captured within a short distance. When confronted by the Chinaman, he admitted the assault, and made the following statement:

"Yes, you son of a bitch [referring to the Chinaman], I thought I had killed you, but I have knocked over a number of your kind, and I didn't think, when I left you, you would ever be able to come here and identify me."

It was further shown that about 11:30 o'clock of the day upon which Neuman was struck, defendant came into a saloon in the neighborhood of the place of business of deceased in an excited, and apparently intoxicated condition, and said:

"For God's sake, give me a drink of anything. I have just been standing down in front of a second-hand store, and I didn't know whether to go in there and buy a revolver and commit suicide or blow in this ten dollars."

Later, word was brought into the saloon that another Jew had been struck down by the mysterious person called the "gas pipe thug," and defendant said: "They ought to kill all the God damned Jews." About 6 o'clock on the same evening defendant again entered the saloon, and, taking more drinks, drew from his pocket two watches and left them with the bartender. They were identified by relatives of deceased (Neuman) as having been his property and part of his stock on sale in the store. Witnesses were not able to say that the watches were there on the day of the killing, but testified to having seen one there a week before, and the other a month before. One, a lady's small watch, was particularly identified by the person who sold it to Neuman. La Rose

had another watch, which the State does not claim was ever the property of Neuman. The testimony of the police officers was to the effect that La Rose admitted having these two watches, but claimed that he had bought the lady's watch in San Francisco, and had won the other at a game of pool in a saloon in Portland. He himself testified on the trial that he bought the large watch in San Francisco, and won the small one at pool. The State introduced testimony of police officers tending to show that the employment of weapons, such as were used in the assaults upon Neuman, Hermann, and Chong, was novel and unusual in Portland.

As the jury were the judges of the value and effect of the evidence, it is unnecessary to state the evidence for the defense; the question being whether the evidence adduced by the State was competent, and, if so, whether it was sufficient to justify the verdict.

For appellant there was a brief and oral arguments by *Mr. Jay Upton*, *Mr. L. W. Humphreys* and *Mr. Haywood H. Riddell*.

For the State there was a brief over the names of *Mr. George J. Cameron*, District Attorney, *Mr. John J. Fitzgerald*, Deputy District Attorney, and *Mr. John F. Logan*, with oral arguments by *Mr. Fitzgerald* and *Mr. Logan*.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

1. At the beginning of this case we are met by the objection that the court erred in admitting evidence of the assaults upon Hermann and Chong. We think the evidence was properly admitted. Three offenses committed in the same locality, each succeeding the other at short intervals, upon persons engaged in selling articles of merchandise of practically the same character, and in substantially the same manner, with the same kind of a weapon, and that, a novel and unusual one, would suggest to the ordinary reasonable mind that they were the offspring of

the same brain, and were planned and executed by the same person. Perhaps, taken alone, they would not be sufficient to justify a conviction, but, when taken with defendant's statement to Chong that he had "knocked over a number of your kind," his possession of the watches, which had been seen in Neuman's store from a few days to a month previously, and his contradictory statements as to where he obtained them, we think there was sufficient evidence to justify the verdict of the jury, and the testimony objected to was properly admitted. The admission of this testimony is in harmony with the case of *State v. O'Donnell*, 36 Or. 222 (61 Pac. 892); *State v. Finch*, 54 Or. 482 (103 Pac. 505); *State v. Germain*, 54 Or. 395 (103 Pac. 521). The decisions of other courts on this subject are so inharmonious that we do not undertake the task of attempting to reconcile them. The many appeals pending in this court, and the pressing necessity of disposing of its rapidly accumulating business render impracticable an opinion fully discussing every phase in which this subject has been presented in the remarkably able brief submitted by counsel for defendant. While it has been thoroughly considered, we are forced to content ourselves with a bare statement of our conclusions.

2. Another objection urged was the admission of the testimony of Thomas Kinney, who testified before the grand jury under the name of Thomas Leondor. Upon the trial in the circuit court he testified that he was a member of an acrobatic trio known as the "Leondor Bros. Trio," that his true name was Kinney, but that he was also known as Thomas Leondor. It appeared from the testimony that the saloon where he was employed was known as "Leondor Bros. Saloon," and, as it is shown that defendant was in this place much of the time for a day or two before his arrest, it is evident that giving witness a name that he had commonly gone by, and by which the saloon where he was employed was known, did

not in any way mislead the defendant as to his identity; and, the object of placing the name of a witness upon the indictment being only to identify the particular person who testified before the grand jury, any name assumed by him will satisfy the substantial requirements of this statute.

The judgment of the lower court will be affirmed.

AFFIRMED.

Argued May 7, decided August 17, rehearing denied October 23, 1909.

TAYLOR v. TAYLOR.

[108 Pac. 524.]

APPEAL AND ERROR—LAW OF THE CASE.

1. A judgment of an appellate court concerning a subject not in issue is void and subject to collateral attack, and may be disregarded by the trial court; but it cannot be so disregarded for fraud or mere irregularities.

DIVORCE—PROPERTY RIGHTS—DETERMINATION—ACQUIESCENCE.

2. Where the parties to a divorce proceeding made no objection to the determination of their property rights in the property in controversy, they impliedly consented to such determination concerning real estate mentioned in the pleadings in the action, and the husband, having been directed to convey certain of such real estate to his wife, acquiesced in the decree by executing a deed to her in accordance therewith.

APPEAL AND ERROR—PRIOR APPELLATE DETERMINATION—LAW OF THE CASE.

3. Where, on appeal from a divorce decree, it was not suggested that the holding awarding certain property to the wife was in conflict or inconsistent with any of the issues, the decree of the Supreme Court, at the expiration of the time allowed for rehearing, was not subject to review on any other appeal, or in proceedings in any court in which the question might arise, but became the law of the case.

TRIAL—WAIVER OF IRREGULARITIES.

4. An order overruling a motion for a nonsuit will not be disturbed on appeal, when the omission, if any, is afterwards supplied by either party to the proceeding.

APPEAL AND ERROR—MOTION FOR NONSUIT—REVIEW.

5. The denial of a motion for a nonsuit must be reviewed on appeal with reference to the entire record submitted, and must be affirmed if the proof adduced was admissible and discloses facts entitling the case to be submitted to the jury.

TRIAL—RECEPTION OF EVIDENCE.

6. Where a part only of the judgment roll was material to an issue, the court did not err in refusing to admit the entire record.

DIVORCE—PROPERTY RIGHTS—DETERMINATION.

7. The individual property of a married woman, not growing out of the marriage relation, or the proceeds thereof, is not a proper subject for adjudication in an action by her for divorce, as against a timely objection.

JUDGMENT—CONCLUSIVENESS—FINDINGS OF FACT.

8. Findings of fact leading to a decree, affirmed by the Supreme Court, in a prior action between the parties, cannot be considered in a subsequent proceeding, so far as they are in any manner inconsistent with the decree affirmed.

JUDGMENT—PRIOR ADJUDICATION—DETERMINATION OF ISSUES—OPINION.

9. Where a decree, affirmed on a prior appeal, is ambiguous, or fails to show on which of several issues it is founded, the opinion of the Supreme Court may be examined, to determine the point actually decided.

DIVORCE—PROPERTY RIGHTS—"PROPERTY GROWING OUT OF MARRIAGE RELATION."

10. The expression "property growing out of marriage relation," which a court in a divorce proceeding is authorized to distribute, has reference only to that class of property, the interest in which of either husband or wife attaches by operation of law, as dower, curtesy, tenancy by the entirety, or in case of divorce, provision for division of which is made in Section 511, B. & C. Comp., and does not apply to property belonging to the wife.

DIVORCE—ACTION BY DIVORCED WIFE AGAINST HUSBAND—STATUTES.

11. Under Sections 5244, 5249, B. & C. Comp., extending to a wife, as well as to the husband, such rights of action with reference to each other as exists with reference to other parties, a *feme sole*, after divorce was authorized to sue her former husband in assumpsit to recover rents collected by him from her separate property, for which he had failed to account.

JUDGMENT—RES JUDICATA—QUESTIONS CONCLUDED.

12. A judgment or decree is conclusive as to every matter actually litigated, and, with certain exceptions, as to every matter which might have been litigated, or decided as an incident thereof.

JUDGMENT—PAROL EVIDENCE—CONTRADICTION OF RECORD.

13. Extrinsic proof and parol evidence is inadmissible to explain what was formerly adjudicated in a prior decree respecting matters not there in issue.

HUSBAND AND WIFE—NECESSARIES—WIFE'S LIABILITY—STATUTES.

14. Section 5230, B. & C. Comp., providing that husband and wife, or either of them, is chargeable with family expenses, including necessities or household supplies, and that they may be sued jointly in reference thereto, is for the protection of creditors only, and does not change the common-law duty of the husband to maintain his wife during coverture and to provide family necessities, as between them.

HUSBAND AND WIFE—WIFE'S SEPARATE PROPERTY—RENTS AND PROFITS—AUTHORITY OF HUSBAND.

15. Where a husband, as his wife's agent, rented her separate property to a merchant tenant, his agreement that the family account for necessities purchased of the merchant should be deducted from the rent was not within the scope of his authority, nor binding on the wife by reason of her mere acquiescence or silence, in the absence of clear and distinct acts on her part showing her consent thereto.

HUSBAND AND WIFE—WIFE'S SEPARATE PROPERTY—RENTS—APPLICATION TO TAXES OR IMPROVEMENTS.

16. Where a husband acted as his wife's agent to rent her separate property, he was not, by such fact alone, authorized to apply the rent received to the payment of taxes or improvements.

DIVORCE—CONCLUSIVENESS OF DECREE—PROPERTY RIGHTS.

17. Where, in a divorce proceeding, the decree, in addition to granting a divorce, granted plaintiff a money allowance in specific real property with

the intent that such allowance should amount to a division of property accumulated by their joint effort during coverture and the settlement of all rights growing out of the use of the property, and after final adjudication by the Supreme Court both parties acquiesced therein and accepted the benefits of the decree, it was conclusive against the wife's right to recover rents collected from the property which the husband conveyed to her, which accrued prior to such conveyance.

(MR. JUSTICE KING dissents from the last paragraph only.)

From Umatilla: HENRY J. BEAN, Judge.

Statement by MR. JUSTICE KING.

This is an action by Isabella Taylor against Moses Taylor, formerly her husband, for money had and received. In the year 1905, plaintiff and defendant, pursuant to a suit instituted the previous year, were divorced. In the decree alimony was awarded the wife, and certain property rights were adjudicated, a general statement concerning which may be found in *Taylor v. Taylor*, 47 Or. 47 (81 Pac. 367). The present action involves the right to recover money alleged to have been received by defendant in the renting, together with that collected by him in the sale, of lots 11 and 12 in block 1 of Kirk's addition to Athena, Oregon.

It appears that during the year 1900, Moses Taylor gave and deeded to his then wife, the plaintiff herein, the lots mentioned, known as the "Athena property." Later he found a purchaser therefor at the agreed price of \$6,000, received part payment thereon, caused the proper conveyance to be executed, and took a mortgage in his own name for the balance of the purchase price. The purchaser subsequently defaulted, and, to secure a cancellation of the debt and mortgage, conveyed the property to Moses Taylor, instead of to Mrs. Taylor, from whom he had acquired it. In the divorce proceeding both the trial court and the supreme court found that Isabella Taylor had at one time held the legal title to the Athena lots, and that, notwithstanding the subsequent transfers in reference thereto, she had at all times been the equitable owner thereof, and accordingly decreed the realty described, together with other lands and per-

sonalty, to her as her individual property, at the same time awarding her alimony in the sum of \$6,500.

The complainant, as a first cause of action, avers that between October 1, 1901, and March 1, 1905, she was the owner in her individual right of the Athena lots, and that between the latter date and the time when they were reconveyed to her by the defendant, under the decree of the court, the property was rented to a third party by defendant as her agent, at a monthly rental of \$50 a month, all of which defendant received, amounting, including interest, to \$2,707.60, none of which has been paid. And as a second cause of action alleges: That in December, 1900, she was the owner of a certain piece of real estate in Umatilla County—which the record discloses refers to the Athena property—which she sold, in pursuance whereof, and as a part of the purchase price, she alleges there was paid to her then husband, this defendant, the sum of \$3,800 for her use and benefit; that defendant concealed this fact from her, and has neglected and refused to pay to her any part of the sum thus collected, which, with interest thereon, aggregates \$5,367.60, for which sum, together with that specified in the first cause of action, judgment is demanded.

Defendant answered admitting that between October 1, 1901, and March 1, 1905, the premises were rented at the monthly rental averred, but denies that he collected any part thereof, except the sum of \$300, and denies that any part of any such collections made by him was for the use or benefit of plaintiff, or that he had refused to pay any part thereof, and as an affirmative defense thereto alleges that at all times prior to September 1, 1904, plaintiff had with the store of the tenant who occupied the premises, an open running account, and that her family traded sufficiently with said tenant to pay the rents to that date, the defendant thereby and in that manner receiving the rents therefor, by reason of which nothing is due plaintiff from defendant for rents during

such time; that after September 1, 1904, he collected the \$300 above mentioned, and no more, on the rents on said property, none of which sum is due plaintiff. It is also denied that on or about December 1, 1900, plaintiff was the owner of the "certain piece of real property" as alleged, or contracted to sell and convey the same, or that defendant, as agent, received the sum of \$3,800 for the use and benefit of plaintiff, or any sum as purchase money thereon greater than \$1,000, which latter sum he denies was received for plaintiff's use or benefit. This was followed by averments to the effect that \$250 thereof was repaid to the purchaser of the realty, leaving the net amount received by defendant on the alleged transaction, the sum of \$750, and no more, which it is denied that he failed to pay to plaintiff, or that any part thereof is due or owing to her. He further alleges that the said sum of \$750 was paid out in improvements upon the buildings and in taxes upon the Athena property, and that \$1,022.90 in all was paid therefor. As an affirmative and separate defense, defendant alleges that plaintiff should not be permitted, and is estopped, to assert a right to any of the moneys collected for rents or from the sales in question, setting out in support thereof proceedings in the divorce suit, consisting of the pleadings, findings of fact, and decree of the trial court, together with the mandate with the decree thereon of the cause on appeal to the Supreme Court. A demurrer was interposed and sustained to this plea on the ground that sufficient facts were not stated to constitute a defense, and, a reply having placed the cause at issue, the action was tried, resulting in a verdict and judgment for plaintiff in the sum of \$2,763, from which defendant presents this appeal. REVERSED.

For appellant there was a brief over the names of *Messrs. Raley, Richards & Raley*, with oral arguments by *Mr. James H. Raley* and *Mr. M. C. Richards*.

For respondent there was a brief with oral arguments by *Mr. Douglas W. Bailey* and *Mr. S. F. Wilson*.

MR. JUSTICE KING delivered the opinion of the court.

The questions here involved will, so far as practicable, be examined in their logical order, without reference to the numerical order assigned by appellant.

1. Assignments of error Nos. 1, 2, 3, 6, 10, and 11, respectively, all bear upon the same general subject presented for consideration, and will be considered together. They include the rulings of the trial court upon the demurrer to the answer, upon a motion for nonsuit, and the exclusion of certain evidence offered by defendant. In this connection the position of defendant, briefly stated, is: (1) That the *decree* in the divorce suit, so far as it relates to the Athena lots, is void; (2) that, if not void, the matters here involved were fully determined therein and are not subject to investigation here.

It appears from the averments in the answer, to which a demurrer was sustained, that in her petition for alimony, as well as in her answer subsequently interposed in the divorce suit, the plaintiff herein assumes to give in detail the property owned by Moses Taylor, and included therein the Athena realty with other property there described, as to which Taylor made no denial. After setting up an affirmative defense therein, she concluded her answer by demanding: (1) Dissolution of the bonds of matrimony; (2) that a decree be granted giving her a divorce, together with the custody of certain children there named; (3) that she be decreed the ownership of 160 acres there described in section 21; (4) an undivided one-third interest in all her husband's real estate; (5) \$14,960 as alimony; and (6) \$50 a month for the support and maintenance of herself and minor children. It is argued in this connection that the decree of the trial court, and also that of the Supreme Court affirming it, in so far as they relate to the Athena property, were outside of the issues, and therefore void. This contention presents

for solution a unique as well as difficult question. Mr. Justice CLARKE, of the North Carolina Supreme Court, in volume 3, Cyc., at page 489, states the rule upon the subject thus: "An appellate judgment which is clearly void for want of jurisdiction may be disregarded in the court below, but not for fraud or mere irregularities." If, therefore, in the trial of the proceeding in which plaintiff was decreed the realty out of which she claims the moneys here sought to be collected, the pleadings presented no issue showing that she claimed the property in her own right, and the trial court was for that reason without jurisdiction in the first instance to make any decree concerning the property, the decree would be void, and subject to a collateral attack in the manner here presented; otherwise it is not subject to attack and must stand as the law of the case. 23 Cyc. 1055.

2. There may have been some question in the first instance whether a cause of suit, having for its purpose the determination, or quieting of the title to the individual property of either of the parties, was properly united with a cause of suit involving marriage rights, except the property rights for which provision is made in sections 511, 512, 513, B. & C. Comp. *Wetmore v. Wetmore*, 40 Or. 332 (67 Pac. 98). But, whatever may be the rule on the subject, no objection thereto having been made by either of the parties, they impliedly consented to a determination of their respective rights concerning the realty mentioned in the pleadings, which determination was subsequently ratified and acquiesced in by Taylor in executing the deed and his wife accepting the same, according to the tenor of the decree. It is true that it appears that in the divorce suit this plaintiff alleged that her husband, the plaintiff therein, was the owner of the lots in Athena, being the "certain property" alluded to in the complaint herein, to which allegation her then husband made no denial; but, notwithstanding this averment and the implied admission, the trial court, in its

findings of fact and decree, held Mrs. Taylor to be the owner of the legal title thereof from the time it was given to her by her then husband, and the owner of the equitable title at all times after the date of the sale and mortgage. It thus appears that the realty concerning which it is maintained the decree was void was specifically mentioned in the pleadings in the former controversy, thereby becoming a part of the subject-matter of that suit, and accordingly within the jurisdiction of both the trial and the appellate courts. Both courts were therefore fully authorized to enter a decree of some kind in reference thereto.

3. A decree was entered, and the question as to whether it was erroneous becomes unimportant, for the only question with which we can now be concerned goes to the jurisdiction, or the right to consider their interests with respect to the realty as a part of the subject-matter of that suit. This must be tested by inquiry relative to the right to enter any decree, and not as to whether a decree was improperly entered. Considered thus, it is obvious that the court acted within its jurisdiction, and that, if it acted erroneously, the error was such as could have been brought to the court's attention while pending on appeal, and before the cause was finally closed. No question in that suit, however, was raised or presented here concerning this alleged irregularity. It was not suggested in any manner that the holding was in conflict or inconsistent with any of the issues, from which it follows that, when the time for rehearing elapsed, the decree of this court became final, and consequently the law of the case, and not subject to review on any other appeal, or in any other proceeding in any court in which the question might arise. Among the authorities recognizing and applying this rule are: *Trust Co. v. Coulter*, 23 Or. 131 (31 Pac. 280); *Stager v. Troy Laundry Co.*, 41 Or. 141 (68 Pac. 405); *Baker Co. v. Huntington*, 48 Or. 593 (87 Pac. 1036; 89 Pac. 144). And more directly in point:

Scottish American Co. v. Reeve, 7 N. D. 552 (75 N. W. 910) ; *Pollock v. Cohen*, 32 Ohio St. 514; *Damon v. DeBar*, 94 Mich. 594 (54 N. W. 300).

4. Coming now to a consideration of the sufficiency of evidence adduced, and of points urged relative to the admission thereof, it appears: That the proof on the part of the plaintiff tends to show that the defendant, as plaintiff's agent, rented the property and received the rent therefor in the sum claimed; that he made a sale of the realty and received not less than \$1,000 as a part payment thereon, none of which has been paid to plaintiff. In support of plaintiff's title, there was offered, and, over objection, admitted in evidence, the judgment roll in the divorce proceeding. In offering the judgment roll in evidence, plaintiff's counsel stated that it was introduced for the sole purpose of establishing title to lots 11 and 12 in block 1 in Kirk's addition to the town of Athena, referred to in the latter part of the trial court's finding of fact No. 13, contained in the judgment roll offered. This was followed by admission for the same purpose, and without objection, of the mandate of the Supreme Court in the same cause. A motion for nonsuit was interposed and denied, the ruling on which is included among the errors assigned. An order overruling a motion for nonsuit will not be disturbed when the omission, if any, is afterwards supplied by either of the parties to the proceeding. *Crosby v. Portland Ry. Co.*, 53 Or. 496 (100 Pac. 300) ; *Trickey v. Clark*, 50 Or. 516 (93 Pac. 457).

5. Under this rule the adequacy of the motion must be considered with reference to the entire record submitted, which in the case at bar, if the proof adduced was admissible and properly presented, discloses facts entitling the cause to be submitted to the jury; and the motion was properly denied.

6. Under the seventh, eighth, and ninth assignments it is maintained that the court erred in admitting in

evidence, on behalf of plaintiff, the judgment roll, and in not permitting the entire record, of which that offered was a part, to be taken to the jury room. We know of no reason why any part of the record, except that bearing upon the subject for which it was introduced, should either be read to the jury, or taken to the jury room. This is a matter largely in the discretion of the trial court. The parts of the record pertaining to the matters sought to be proved should be produced; nothing further is required, nor is it expected that papers bearing upon immaterial points, merely because a part of the judgment roll, should be turned over to the jury for their examination. 10 Enc. Ev. 788; *Walker v. Doane*, 108 Ill. 236.

7. This brings us to a consideration of the sufficiency of the plea of former adjudication and estoppel. Since the real property, out of which rents and other moneys sued for came, was the individual property of plaintiff, and did not grow out of the marriage relation, neither the title to such realty nor the proceeds arising therefrom could, if timely objections had been made, have been litigated in the divorce proceeding. *Huffman v. Huffman*, 47 Or. 610 (86 Pac. 593; 114 Am. St. Rep. 943). But that the title to the realty was in fact adjudicated, or at least determined as an incident of the divorce proceeding, we have heretofore held, and it remains to be seen whether the moneys collected by defendant for rent and on sales was also litigated as an incident to such suit. Defendant offered in evidence the entire record and proceedings in the divorce suit, supplemented by an offer to adduce oral testimony in support of his claim that everything in issue here was tried out and considered in the former proceeding in connection with the title to the realty there adjudicated, to which objections were sustained, and the ruling of the court thereon assigned as error.

8. In its findings of fact the circuit court referred to the real property of both parties as having been accumu-

lated by their joint earnings during coverture, including therein a description of the Athena lots, but made no specific reference to any of Mrs. Taylor's personal property. This feature, it is argued, discloses that when the trial court decreed that Mrs. Taylor was the owner of the Athena property, and of the 160 acres of additional land, and directed Taylor to execute to her a deed therefor, it was with the view that this should be in full settlement of all interests of whatever nature and kind she might have in the real and personal property owned by either. And this may have been the intention so far as it related to any property mentioned in the pleadings, or issues, or otherwise brought in question—the choses in action here involved not even being suggested therein—but it overlooks the legal phase that the court has jurisdiction under the statute only to award to either party in a divorce proceeding an interest in the property of the other as provided in Section 511 of the Code (B. & C. Comp.) which section directs that the court shall decree to the party not in fault, an undivided one-third interest in the realty of the other. As held in *Huffman v. Huffman*, the court has no power to enter a decree affecting the interest of either, in the personalty of the other. The property involved in this proceeding consists of choses in action, and hence is personalty as to which, in the absence of some waiver of rights by, or without the consent of Mrs. Taylor, the court had no power to enter a decree affecting her interests therein, especially since it was not in any manner made an issue. No reference whatever can be found to the claims here involved in the record of the divorce suit offered in evidence. Furthermore, the findings of fact—if they are entitled to be considered at all in this proceeding—must be construed in connection with the conclusions of law, decree, opinion, and mandate of the Supreme Court or decree thereon, from which it is manifest that Mrs. Taylor originally held the legal title to the Athena property, and has, at all times since

the attempted sale thereof, held the equitable title, and while the property, taken as a whole, was acquired by them since their marriage by reason of their joint efforts, labors, etc., it became her individual property, as did that held by Taylor in his own name; and these findings, when construed with the rest of the record mentioned, amount merely to a conclusion of the court to that effect.

9. Moreover, the findings of fact are not entitled to consideration in this proceeding to the extent that they may be in any manner inconsistent with the decree as affirmed on appeal. As held in *Gentry v. Pacific Live Stock Co.*, 45 Or. 233 (77 Pac. 115) and *De Bow v. Wollenburg*, 52 Or. 404 (97 Pac. 717), an affirmance by the Supreme Court of a decree of the circuit court does not necessarily sustain the findings of fact of the trial court. Such suits are tried *dè novo* on appeal, and, "when the decree is definite and certain, the opinion of the court cannot be used to show what matters were considered or determined. 1 Van Fleet, Former Adjudication, § 278. Where, however, the decree is ambiguous, as in this case, or fails to show upon which of several issues it is founded, the opinion may, we think, be examined to determine what point was actually decided. *Strong v. Grant*, 13 D. C. (2 Mackey), 218; *Pepper v. Donnelly*, 87 Ky. 259 (8 S. W. 441); *Legrand v. Rixey's Adm'r*, 83 Va. 862 (3 S. E. 864).

10. In its conclusions of law based upon its findings, the trial court recites "that the defendant is entitled to a deed from the plaintiff conveying to her lots 11 and 12 in block 1 of Kirk's Third addition to the town of Athena, in Umatilla County, Oregon, free of all incumbrances, liens, and claims of every kind and character, and that defendant is entitled to have and to hold the same in her name, as her own separate property." In the decree the lower court declares Isabella Taylor, her heirs and assigns, to be the owner in fee simple of the Athena lots, with other realty there mentioned, the effect of

which was clearly intended to be that from the date of the entry of the decree, she should become the holder of the legal title. The date of the inception of her right to the legal title, and the period of time during which she was the holder of the equitable title, are not clear from the decree; but this is illuminated by the opinion of this court in *Taylor v. Taylor*, 47 Or. 47 (81 Pac. 367), with reference to which it is stated that: "The defendant at one time also held the legal title to the lots in Athena, which she and the plaintiff conveyed to a purchaser who was unable to pay the price agreed therefor, whereupon the lots were conveyed to the plaintiff. It will thus be seen that the real property decreed to the defendant was equitably hers before this suit was taken." It is manifest therefore that it was intended to be held that this property equitably belonged to Mrs. Taylor from the date of the execution of the mortgage under the sale, which date definitely appears from the testimony adduced by plaintiff. It follows that when we apply the rule quoted from *Gentry v. Pacific Live Stock Co.*, 45 Or. 233 (77 Pac. 115), in the construction of the decree of this court, this real property was the individual property of Mrs. Taylor, in which her husband had no interest whatever. Although it was acquired through dealings with her husband since their marriage, it did not grow out of the marriage relation. The expression with reference to "property growing out of the marriage relation" has reference only to that class of property the interest in which, by either the husband or wife, attaches by operation of law; such, for example, as dower, curtesy, tenancy by the entirety, or in case of divorce, the interest for which provision is made in Section 511, B. & C. Comp.

11. The question then arises whether plaintiff can maintain an action against her former husband for moneys arising out of her estate and collected during coverture, and which he made no express promise to

repay. At one time in the history of the litigation upon this subject, a woman could not maintain an action at law upon an implied contract arising during coverture, but was required to resort to the equitable forum in order to assert her right. *Pittman v. Pittman*, 4 Or. 298. Later, however, there became awakened in the minds of those in control of the legislative department of our State, a higher sense of justice, which recognized that a woman has rights that even her husband is bound to respect. Consequently the law was amended upon the subject by extending to the wife, as well as to the husband, the same right of action or suit with reference to each other, as applied to any other parties. Sections 5244, 5245, 5249, B. & C. Comp. These sections of the statute were construed and applied by this court, holding to the above effect, in *Grubbe v. Grubbe*, 26 Or. 363 (38 Pac. 182), making a discussion of the reasons for this rule unnecessary. In *Webster v. Webster*, 58 Me. 139 (4 Am. Dec. 253), which is a well-considered case upon the subject, the court held, under a statute similar to ours, that the wife, after divorce, may recover on promissory notes given her by the husband during coverture. Sustaining the same principle: *Carlton v. Carlton*, 72 Me. 115 (39 Am. Rep. 307); *Flattery v. Flattery*, 91 Pa. 474. Much of the apparent conflict among the cases bearing on the question is occasioned either by there being no statutes on the subject, leaving the common-law rule in force, or else the statutes construed differ from those in force here.

This confronts us with the question whether the awarding of alimony to plaintiff and decreeing that her husband execute to her a good and sufficient deed to the realty to which he held the legal title, and with which he subsequently complied, constituted an adjudication of the monetary transactions between them arising out of such real estate. As held in the case of *Grubbe v. Grubbe*, 26 Or. 363 (38 Pac. 182), a married woman

with respect to her individual property, whether real or personal, may sue and be sued the same as a *feme sole*, without reference to whether the transaction is with her husband or with any other person; and, as before stated, the rule as announced by former decisions of this court is to the effect that a judgment or decree is final as to every matter actually determined, and that might have been litigated or decided, as an incident thereof. To this rule, however, exceptions are disclosed in nearly every decision upon the subject. In *Ruckman v. Union Ry. Co.*, 45 Or. 578, 581 (78 Pac. 748, 750: 69 L. R. A. 480), after announcing the general rule, and holding that, when an action is upon a definite claim or demand, the former judgment can only operate as a bar or an estoppel as against matters actually litigated, or questions directly in issue in the former action, Mr. Justice BEAN observes: "This distinction should always be kept in mind in considering the effect of a former judgment or decree: If the second action or defense is upon the same claim or demand, the former judgment is a bar not only as to matters actually determined, but such as could have been litigated; but, if it is upon another claim or demand, the former judgment is not a bar, except as to questions actually determined or directly in issue."

Now, measured by this rule, does the case at hand come within the principle first stated, or within the second? It is obvious that this action was not brought upon the same claim as was determined in the former proceeding. In the divorce suit the title to the realty was decreed and no mention made of any agency existing between the parties, or concerning the collection of rents, or of other money transactions, either in any of the findings or in the decree; but their respective rights to realty owned by each were mentioned, ascertained, and decreed. We must assume therefore the other features were not involved, from which it follows that no

question is entitled to be presented in this action relative thereto. The title to that property was settled, and plaintiff now seeks to recover for moneys coming into defendant's hands growing out of, but segregated from, such property.

Taylor was not the tenant of his wife, but her agent. "Where the wife has a separate estate, and the husband takes possession of it, and manages it for her, he becomes her general agent, and as such is accountable to her for the income, profits, or interest which he makes by use of the property." *Oliver v. Hammond*, 85 Ga. 323 (11 S. E. 655); *Grubbe v. Grubbe*, 26 Or. 363 (38 Pac. 182). This is not an attempt to collect rents from defendant for property claimed by him, but to compel him to pay over moneys collected as plaintiff's agent, for her use and benefit, which is as separate and distinct from the land itself as would have been grain severed from the soil and sacked and stored in a warehouse, or horses, or cattle, or even promissory notes. A case analogous, in that it involves some of the principles thus illustrated, is that of *Gentry v. Pacific Live Stock Co.*, 45 Or. 233 (77 Pac. 115), in which it was held that a determination of the effect of a contract under which Gentry entered into possession of the realty did not constitute an adjudication respecting the hay cut thereon by Gentry, and so held notwithstanding the hay was cut under the contract construed, and reference thereto made in the pleadings in the original suit. See *Gentry v. Pacific Live Stock Co.*, 45 Or. 233 (77 Pac. 115); *Pacific Live Stock Co. v. Gentry*, 38 Or. 275 (61 Pac. 422; 65 Pac. 597). In the former case, this court, in referring to the decision in the equity suit on this feature, holds: "The decree was a final adjudication as to the right of the company to maintain the suit, and is a bar to a subsequent prosecution of another suit by it against Gentry upon the claim or demand. In an action between the same parties upon a different claim or demand, however, it can operate

as a bar or estoppel only as to matters in issue and which were actually litigated and determined. *La Follett v. Mitchell*, 42 Or. 465 (69 Pac. 916: 95 Am. St. Rep. 780); *Cromwell v. County of Sac*, 94 U. S. 351 (24 L. Ed. 195). Neither the title to the hay grown on the disputed premises nor the question of the rights of the respective parties thereto was in issue in the former suit, or litigated or determined thereby. The only question was the right of the live stock company to enjoin and restrain Gentry from violating the contract alleged in the complaint, and from trespassing on the premises and interfering with its possession and right thereto."

12. It is clear therefore that the question here presented comes within the exception quoted from *Ruckman v. Union Ry. Co.*, 45 Or. 581 (78 Pac. 748: 69 L. R. A. 480), and that the decree in the divorce suit is not a bar to this action, unless defendant is entitled to and can establish by extrinsic evidence that the matters here involved were there presented for consideration, and under the issues could have been, and were intended to have been, litigated, which feature will hereinafter be considered. This is an action between the same parties, and, while it relates to matters incident to the realty, the title to which was formerly determined, it is evident that it was neither litigated in the former proceeding, nor, so far as appears from the records, was it necessary that it should have been brought into that suit. Moreover, there is some doubt whether even the land itself was properly involved. *Bender v. Bender*, 14 Or. 353 (12 Pac. 713); *Weber v. Weber*, 16 Or. 163 (17 Pac. 866). But, for the reasons hereinbefore given, the title thereto must be conclusively deemed to have been settled, and the decree as there entered is the law of this case so far as it affects such property.

In *Glenn v. Savage*, 14 Or. 567, 573 (13 Pac. 442), Mr. Justice STRAHAN, after holding the judgment in that case to be a bar, because the matters involved were in

issue in the former proceeding, says: "There is no dispute as to the principle of law that an issue once determined in a court of competent jurisdiction cannot be again litigated, and may be opposed as an effectual bar to any further litigation of the same matter by parties and privies. The contention is as to its correct application. * * In *Caperton v. Schmidt*, 26 Cal. 479 (85 Am. Dec. 187), it is said: 'It will be seen, from the rule as above stated, that the matter adjudicated, to become as a plea a bar, or as evidence conclusive, must have been *directly* in issue, and *not* merely *collaterally litigated*. It must be a fact immediately found according to the pleadings—not that on which the verdict was merely based—a *fact in issue as distinct from a fact in controversy*.'" It is manifest, from the part we have italicized, that the claims involved could not have been determined in the divorce suit, and these views are in harmony with Section 748, B. & C. Comp., which reads:

"That only is deemed to have been determined by a former judgment, decree, or order which appears upon its face to have been so determined, or which was actually and necessarily included therein or necessary thereto."

They are also consonant with the principles enunciated in the following cases: *White v. Ladd*, 41 Or. 324, 333 (68 Pac. 739: 93 Am. St. Rep. 732); *La Follett v. Mitchell*, 42 Or. 465 (69 Pac. 916: 95 Am. St. Rep. 780); *Pacific Biscuit Co. v. Dugger*, 42 Or. 513, 517 (70 Pac. 523); *Hoover v. King*, 43 Or. 281 (72 Pac. 880); *Caseday v. Lindstrom*, 44 Or. 309 (75 Pac. 208); *Heilner v. Smith*, 49 Or. 14, 17 (88 Pac. 299); *Roots v. Boring Junction Lbr. Co.*, 50 Or. 298, 318 (92 Pac. 811: 94 Pac. 182); *Young v. Young*, 53 Or. 365 (100 Pac. 656).

The case of *Caseday v. Lindstrom* is analogous to the one under consideration so far as it relates to the first cause of action therein. In that case the plaintiff and defendant had formerly been husband and wife. The husband procured a divorce on the ground of cruel treat-

ment, and was awarded one-third interest in the defendant's real property, and in that proceeding there was involved and placed in issue by the pleadings a certain 45-acre tract of land. The decree awarding the divorce and one-third interest in defendant's realty was silent as to the ownership of the 45-acre tract. Later the defendant in that suit brought an action against the plaintiff therein upon two causes of action. It was averred in the first cause of action that the plaintiff during her coverture loaned to the defendant, her former husband, \$420, which he agreed to pay, and that, in addition thereto, he, as her agent, collected and received sums of money belonging to her aggregating \$672, none of which had been paid. As a second cause of action, she alleged that she, during her coverture, sold to her husband, the defendant, the 45-acre tract of land above alluded to for a certain sum specified, which he had neglected to pay. Judgment was demanded accordingly, and trial had, resulting in a judgment in her favor for \$498.10 upon the first cause of action, and \$1,061.50 upon the second cause, from which an appeal was taken. In passing upon the legal phases of the controversy, this court held that the matters connected with the second cause of action were litigated in the former proceedings, for which reason the judgment roll offered in evidence, showing that fact, was admissible, and by reason of which the cause was reversed and remanded. It will be observed, however, that the cause was not reversed on account of the claim asserted in the first cause of action, which claim, so far as we can discover from an examination of the briefs (volume 176, p. 178), is identical in principle with the first cause of action involved here. From an examination of the opinion, it will be observed that the court does not, as a matter of law, question plaintiff's right to maintain her first cause of action, nor in any way indicate that it was adjudicated in the former proceeding; and, as an inspection of the

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issues presented by the briefs therein reveals that there was no mention of moneys there involved, it is evident that it was the intention of the court to recognize that this claim was neither incident to, nor litigated in, the divorce proceedings, and that the plaintiff could, as a matter of law, maintain an action for the recovery thereof; the court, so far as the first cause of action there presented was concerned, passing only upon the admission of evidence.

There is this difference, however, if it may be termed such, between the first cause of action in the Caseday case and the one under consideration: There the money had and received, for which judgment was sought, did not grow out of the real estate, but was for money collected that was due her from other parties. Here the money involved was collected for rents from property and for the sale of property to which plaintiff at one time held the legal title, but to which, when the transaction complained of took place, she held the equitable title. It then remains to be seen whether this distinction affects the legal status of the claim. That an action for money had and received may be maintained where one sells property belonging to another and fails to account for the money received therefor appears well settled (4 Cyc. 320: 27 Cyc. 860), and, as above stated, under our Code such rights between husband and wife in this respect are no different than between other persons. This confronts us with the inquiry as to whether the fact that the party receiving the money holds the legal title, and the person for whom collections were made the equitable title, can affect the remedy. It has been well said that: "An action for money had and received is an equitable action governed by equitable principles. * * It may in general be maintained whenever one has money in his hands belonging to another, which, in equity and good conscience, he ought to pay over to that other." 27 Cyc. 849; *Peterson v. Foss*, 12 Or. 81 (6 Pac. 397); *Hornefus v. Wilkinson*, 51 Or. 45 (93 Pac. 474).

It has been held that an action for money had and received cannot be maintained against one who receives the rent of land while in possession under a claim of title adverse to plaintiff. This holding is on the theory that, if it appears that the title is held adversely, no implied agreement to pay the rent to another can arise; but, where the possession is not adverse, the true owner is entitled to recover the rents received by another. 27 Cyc. 865. The mere fact that plaintiff held only the equitable title during the time when the rents were collected does not make it necessary that she resort to a court of equity for the adjustment of the claim, especially as in this case, where the amount can readily be ascertained and involves no intricate accounts. *Bresnahan v. Nugent*, 106 Mich. 459 (64 N. W. 458); *Harty v. Teagan*, 150 Mich. 77 (113 N. W. 594). "It is true that the title to land cannot be tried in an action of assumpsit for money had and received, and, for that reason, rents which have been received under an adverse holding cannot be recovered by the rightful owner in this form of action; but, where the possession is not adverse, the true owner is entitled to recover the rents which have been received by another. In such case it is money had and received to the use of the owner; and, as the person to whom the rent was paid would be compelled to account in equity, he may also be held responsible in the equitable action for money had and received." *Price v. Pickett*, 21 Ala. 741, 743.

The question, then, as to plaintiff's right to recover for the rents collected by defendant during the time when she held the legal title, including the period when she was the holder only of the equitable title, depends upon whether the defendant was in possession of the Athena property adversely to her. Plaintiff claims that defendant was acting as her agent. This defendant denies; but there was evidence sufficient to go to the jury on that subject. The question whether a husband

or wife may hold adversely to each other is involved in much doubt, for the presumption is that the possession of husband and wife inures to the benefit of the one holding the legal title. *Ramsey v. Quillen*, 5 Lea (Tenn.), 184. On this point—which is suggested by the fourth assignment of error—defendant admits in his answer, in effect, that plaintiff was the owner of the property, and seeks to avoid responsibility by averring that she received payment in trade at the store of her tenant, to September 1, 1904; and the denials, when construed together, amount merely to a denial that he collected any rent prior to the date mentioned, and a declaration to the effect that such as he collected since has been paid. Defendant first attempts to deny, but subsequently admits, by implication at least, the same facts by pleading payment in a specified manner—by disbursements for improvements, taxes, store accounts, etc. This eliminates from the case any question as to whether defendant, during the time he collected the rents, and other moneys, was claiming title adversely to plaintiff.

13. An application of the principles announced as the law in the following cases clearly settles, contrary to appellant's contention, the question relative to the admission of the records in the former suit, including all extrinsic proof and parol evidence offered to explain what was formerly adjudicated respecting matters not there in issue. *Packet v. Sickles*, 5 Wall. 580 (18 L. Ed. 550); *Russell v. Place*, 94 U. S. 606, 608 (24 L. Ed. 214); *Manny v. Harris*, 2 Johns. (N. Y.) 24 (3 Am. Dec. 386); *Smith v. McCool*, 16 Wall. 560 (21 L. Ed. 324); *Garwood v. Garwood*, 29 Cal. 521; *Taylor v. Dustin*, 43 N. H. 493; *King v. Chase*, 15 N. H. 9 (41 Am. Dec. 675). To admit extrinsic evidence for the purpose offered would be to recognize a right to establish an adjudication of facts not within the issues, hence not "consistent with the record." If, as contended, the decision upon the title to the lots—to which reference was made in

the pleadings in the former proceeding—was not proper, and the court's action thereon was erroneous, much stronger then must be the reason for holding that the matters here involved, which were not mentioned, could not have been adjudicated, and, if not entitled in law to have been considered, certainly extrinsic evidence cannot be admitted to show either a consideration or determination thereof, and error cannot be predicated thereon.

14. In support of the points presented by assignments 5, 12, and 13, it is argued that the court erred in not permitting the defendant to show that the rent of the building was applied in payment of store accounts run by and for the family, in the store of the tenant, and in refusing to admit proof of moneys expended by defendant in improvements, taxes, etc. The sections of the statute above alluded to with reference to the rights of married women only defined and established her status with reference to a rule of property, and contain no language by which the common-law rule of liability incident to the support of a family, or as to moneys expended upon the wife's property by her husband without her request, may be affected. "Although a wife's estate is secured to her separate use, the husband's common-law duty to maintain her during coverture and to provide family necessities still remains, * * and, without an agreement on her part to pay for necessities or household supplies, she will not, in the absence of an express statutory provision bind her separate estate, or be personally liable." 21 Cyc. 1444; *Moore v. Copley*, 165 Pa. 294 (30 Atl. 829: 44 Am. St. Rep. 664); *Oliver v. Hammond*, 85 Ga. 323 (11 S. E. 657); *Harrison v. Taylor*, (Ky.) 43 S. W. 723; *Nelson v. Spaulding*, 11 Ind. App. 453 (39 N. E. 168); *Chester v. Pierce*, 33 Minn. 370 (23 N. W. 539); *Dodge v. Knowles*, 114 U. S. 430 (5 Sup. Ct. 1197: 29 L. Ed. 144).

15. Under the provisions of Section 5239, B. & C. Comp., the husband and wife, or either of them, are chargeable with the family expenses, and may be sued

jointly in relation thereto. This section, however, was intended for the protection of creditors of the husband and wife, and not to change the common-law rule respecting their liability as between each other concerning such matters. Neither the line of questioning excluded by the court, nor the offer of proof made, tended to show an express contract on the part of plaintiff to pay the family account run at the store, or to offset the same against rent charged the tenant; nor does it appear that it was the purpose of the inquiry, or of the proffered testimony, to show an express agreement to that effect. In the absence of such express agreement, only the tenant could have successfully asserted a claim against her. There is nothing in the Code to indicate that defendant could avail himself of any liability created by statute between a wife and third parties. If defendant, as plaintiff's agent, rented the building to the merchant tenant, and made arrangements to apply the rent on the family account, it was not within his authority from his principal to do so, and amounted merely to the application of funds collected for his principal to the cancellation of an obligation, for which, so far as he and his principal (his wife) were concerned, he was liable. To illustrate: Assume A. and B. were partners, and A. purchases from C. goods for which as between the partners A. is under obligation to furnish, and A. settles with C. out of individual funds in his hands belonging to B. Could it legally be held that, because it happened to be an instance where C. could hold the partnership for the goods purchased, A. would not have to account to B.? Certainly not. So it is here. While under the Code the merchant tenant could hold either on the account, this privilege in no way entitled defendant to use his wife's individual funds to cancel an account which as between them the law imposes upon him individually to provide for.

16. Nor can the agency under which defendant is alleged to have been acting in running the property, in

the absence of a showing of ratification to that effect, be held to include the making of improvements or the payment of taxes, or other disbursements thereon, or in connection therewith. She is bound only by his acts within the scope of his authority. 21 Cyc. 1240. Nor does mere acquiescence or silence suffice; it must appear that her acts were clear and definite. No offer is made of proof to such effect, and without such offer defendant was not entitled to introduce evidence tending to show that the proceeds received from the rent were expended either on family accounts, or for improvements. 21 Cyc. 1426; *Geary v. Hennessy*, 9 Ill. App. 17; *In re Sturtevant's Estate*, 61 Conn. 465 (23 Atl. 826); *Scott v. Ford*, 52 Or. 288 (97 Pac. 99). The testimony offered and rejected was not entitled to go to the jury unless offered for such purpose, and so connected with the proof last indicated as to disclose either such express authority, or a ratification of the alleged disbursements.

Assignments 16 and 17 relate to instructions requested but refused, and to instructions given by the court, to which exceptions are taken, and involve only such points as are above determined.

17. From these views I am of the opinion that no errors prejudicial to defendant are disclosed by the record, and the judgment of the circuit court should, accordingly, be affirmed.

But my Associates are of the opinion that the provision in the decree in the divorce proceedings for the benefit of the wife, granting her a money allowance and specific real property, was with the evident intent of the court that such allowance should amount to a division of the property accumulated by their joint efforts during coverture, and a settlement of all rights growing out of the use of such property, and that, after final adjudication in the Supreme Court, both parties having acquiesced therein and accepted the benefits thereof, they must now be deemed to have finally settled and quieted all claims

theretofore existing between them respecting such property, and arising therefrom; but, as it is admitted by defendant that certain rents have been received by him since the making of his deed, plaintiff is entitled to recover to that extent.

They conclude therefore that the cause should be remanded for such further proceedings as may not be inconsistent with their views as thus announced, and so direct.

REVERSED: REHEARING DENIED.

Submitted on briefs September 22, decided October 5, rehearing denied
October 20, 1909.

KESLER v. NICE.

[104 Pac. 2.]

APPEAL AND ERROR—"FINAL DECREE."

1. The "final decree" in partition, within Section 6, Article VII, Constitution of Oregon, limiting the review by the Supreme Court of decisions of the circuit court to those that are final, is that entered on confirmation of the report of referees.

APPEAL AND ERROR—DISMISSAL—WANT OF JURISDICTION.

2. It being patent from the face of the record that the decree in partition is interlocutory, the court will of its own motion dismiss the appeal therefrom for want of jurisdiction.

From Washington: JAMES U. CAMPBELL, Judge.

Statement by MR. JUSTICE SLATER.

The plaintiffs, Abraham L. Kesler, Mary J. Kesler, John Kesler, Elizabeth Kesler, Charles Kesler and Anna Kesler, brought this suit against Charles W. Nice, Bessie Nice, Nora Wilhelmson and John Wilhelmson, for partition of a lot in the city of Forest Grove, and allege that four of them and two of the defendants are the owners in fee simple and tenants in common thereof; that on the lot there is a small house, so situated that the premises cannot be divided and the several shares allotted to the persons entitled thereto.

The answer denies that the plaintiffs have any interest in the lot, and affirmatively avers that the defendants are the sole owners thereof, and prays for a dismissal of the

suit. The cause was submitted to the trial court upon a stipulation of the parties as to the facts, and on July 27, 1909, an interlocutory decree was rendered by the court establishing the rights of the parties in conformity with the averments of the complaint, and directing a sale of the property by a referee named therein. The defendants have attempted to appeal from this decree.

DISMISSED.

Submitted on briefs under the proviso of rule 16 of the Supreme Court, 50 Or. 580 (91 Pac. XII).

For appellant there was a brief over the names of *Messrs. W. M. Langley & Son*.

For respondent there a brief over the name of *Mr. Henry T. Bagley*.

MR. JUSTICE SLATER delivered the opinion of the court.

1. The jurisdiction of this court to review the decisions of the circuit court is expressly limited to such as are final decisions. Section 6, Article VII, Constitution of Oregon. Finality, therefore, must be put to the suit by the circuit court before an attempt can properly be made to have the decision therein revised in this court. *Shirley v. Birch*, 16 Or. 1, 4 (18 Pac. 344); *Conrad v. Packing Co.*, 34 Or. 337 (49 Pac. 659; 52 Pac. 1134; 57 Pac. 1021). And it has been settled in this court that in suits for partition the only decree that is by the statute declared to be "effectual forever," and "binding and conclusive," and therefore final, is that entered upon confirmation of the report of referees. All orders or decrees in the regular course of proceedings prior to that time are merely interlocutory. *Sterling v. Sterling*, 43 Or. 201 (72 Pac. 741). This is the only final decree contemplated by the statute, and the only one from which an appeal will lie. *Bybee v. Summers*, 4 Or. 354.

2. No objection to the jurisdiction of the court has been suggested by any of the parties, but the want of

jurisdiction is patent upon the face of the record; and, the subject-matter of the suit involving the title to realty, it is the duty of the court, at any stage of the proceedings, when the want of jurisdiction appears, to refuse to proceed further, and to dismiss the appeal. *Evans v. Christian*, 4 Or. 375; *McKay v. Freeman*, 6 Or. 449, 453; *State v. McKinnon*, 8 Or. 487, 492. The record should show affirmatively the proper taking of all steps, and the existence of all the facts necessary to confer jurisdiction upon the appellate court. 2 Cyc. 1025.

Since the printed abstract upon which the cause is being submitted by stipulation of the parties, in lieu of the transcript, shows that the decree is interlocutory, and not final, the appeal must be dismissed, and it is so ordered.

DISMISSED.

Argued October 20, decided October 26, 1909.

IN RE SAGE.
YORAN v. SAGE.

[104 Pac. 428.]

EMINENT DOMAIN — PETITION FOR ROAD—GATEWAY—EXPENSE OF FENCING.

1. Laws 1876, p. 25 (Hill's Ann. Laws 1892, § 4075), provided for the opening of "roads of public easement." Laws 1899, page 164 (Section 4966, B. & O. Comp.), provided for a county road thirty feet wide, or a gateway not less than ten nor more than thirty feet wide. Laws 1903, p. 269, § 20, provided that a board of county viewers should locate the road, and as amended by Laws 1907, p. 255, provided for a road not exceeding sixty feet wide, or a gateway not less than ten nor more than thirty feet wide, to be viewed out and located by a board of county viewers. Held, that where a county road "and" gateway were petitioned for, but the lower courts recognized the proceedings to be for the establishment of a gateway, and not for an open road, and so established it, the expense of fencing the road was not an element of the damages suffered by the owners of the land through which the road passes.

COSTS—DEPENDENT ON STATUTE—SPECIAL PROCEEDINGS.

2. Where a special proceeding for the condemnation of land for public purposes is provided by statute, and no provision is made for recovery of costs, none can be awarded; but, where the question of damages has been tried out as in an ordinary action at law, the general laws on the subject of the costs will prevail, so that where in such case the decision of the circuit court has been affirmed on appeal, respondent is entitled to costs.

From Lane: LAWRENCE T. HARRIS, Judge.

This was a proceeding commenced in the county court of Lane County, Oregon, by S. A. Sage and Ella V. Neal, for the purpose of obtaining a road and gateway from their premises across the lands of D. E. Yoran, J. W. Kays, and David Linn. From an order and judgment establishing a road and gateway and awarding damages to Yoran, Kays and Linn, they appealed to the circuit court, and from the judgment there rendered, they again appeal.

AFFIRMED.

For appellants there was a brief over the names of *Messrs. Woodcock & Potter*, with an oral argument by *Mr. Edwin O. Potter*.

For respondent there was a brief over the names of *Messrs. Williams & Bean*, with an oral argument by *Mr. John M. Williams*.

MR. JUSTICE EAKIN delivered the opinion of the court.

This is an appeal from a judgment of the county court of Lane County, Oregon, assessing damages in favor of applicants in a proceeding establishing a road of public easement. The petition of Sage and Neal, for the establishment of a road and gateway was filed in such court, on July 5, 1907, under the provisions of section 20 of the road law of 1903 (Laws 1903, pp. 262, 269), as amended by the act of 1907 (Laws 1907, p. 255).

The petitioners pray for the location and establishment of "a county road and gateway, not less than 10 nor more than 30 feet wide, and that the same be 30 feet wide, from the residence and timber of your petitioners," namely, from lots 4 and 5, and 6 and 7, in section 20, township 18 S., range 3 W., to the county road near the northwest corner of lot 10 in section 17. Upon the same day the county court ordered the board of county road viewers to "view out and locate a county road and gateway, not less than 10 nor more than 30 feet wide," as prayed for, and to assess the damages that may be sustained thereby. On July 30, 1907, the viewers filed

their report, to the effect that they had selected the route, described in the report as "the proposed road of public easement, 30 feet wide," and assessed the damages to Yoran, Kays, and Linn at \$100, and recommended "that the parties praying for the road be required to only keep up gates on property lines." Thereafter, on August 9, 1907, the county court made an order "that the said roadway and gateway be, and the same is hereby established according to said report and the survey," and allowed Yoran, Kays, and Linn damages in the sum of \$100, which was paid to the court, and the court ordered that gates be established and maintained on property lines, from which order, for the allowance of damages, Yoran, Kays, and Linn appealed to the circuit court, where the issue, as to the amount of damages suffered by them, by reason of the establishment of such road and gateway, was tried before a jury, resulting in a verdict in their favor of \$98.20. From the judgment thereon, and for costs against them, Yoran, Kays, and Linn appeal to this court.

1. There are but two questions for consideration, viz: Whether the expense of fencing the roadway should have been submitted to the jury, as an element of the damages; and whether the costs were properly awarded against appellants. In order to understand the elements involved in the question of damages it is well to understand the history of the law providing for such road or gateway. The original law was enacted in 1876, and provided only for "roads of public easement" (Laws 1876, p. 25; Hill's Ann. Laws 1892, § 4075), which only contemplated an open public road. In 1899 (Laws 1899, p. 164 [Section 4966 B. & C. Comp.]) this law was amended; the only change being to provide for "a county road thirty (30) feet in width, or a gateway not less than 10 nor more than 30 feet in width," instead of "a road of public easement." The law of 1903 (Laws 1903, p. 262) is only an amendment of the act of 1899; the change being that the board of county viewers shall

locate the road, instead of the special viewers provided in the original law. It must be noticed that the amendment of 1899 does not provide for "a roadway and gateway," but for a county road 30 feet wide, or a gateway not less than 10 nor more than 30 feet wide. If a county road is petitioned for, then it must be an open road, and must be fenced, and this raises the question for the viewers to determine the damages to the owner of the land in consequence of having his farm divided by a fence, and the various elements of inconvenience arising therefrom, as well as the value of the land taken. *Terwilliger v. Multnomah County*, 6 Or. 295; *Putnam v. Douglas County*, 6 Or. 328; (25 Am. Rep. 527). If the fence must be built and maintained by the owner of the land, this also would be for their consideration, but possibly by the terms of section 24 of the act of 1903 (Laws 1903, p. 270) the expense of building and maintaining the fence would be a charge upon the land to which the easement is appurtenant. That question, however, is not before us. If a gateway is petitioned for, no fencing is contemplated, and the only element of damages would be the value of the land taken and the loss and inconvenience occasioned by travel over the land; the erection and maintenance of the gates being at the expense of the petitioner.

In *Lesley v. Klamath County*, 44 Or. 491 (75 Pac. 709) and *Shannon v. Malheur County*, 48 Or. 617 (87 Pac. 1045), it is held that the petitioner should pray for one or the other of these roads, and not for both, as was done in this case. Nor should it be for a "road or gateway." But if the petition is in the disjunctive, the court shall determine which may be considered. However, the regularity of the proceeding in this case has not been questioned. An appeal from the assessment of damages only is taken, and both the county court and the circuit court recognized the proceeding as for the establishment of a gateway and not an open road, and so established it. Therefore the expense of fencing cannot be considered

as an element of damages, because none is contemplated.

2. As to the question of costs, it is said in *McCall v. Marion County*, 43 Or. 540 (73 Pac. 1031: 75 Pac. 140), that where a special proceeding for condemnation of land for public purposes is provided by statute, and no provision is made for recovery of costs, they cannot be awarded. This rule would apply to the special proceeding to condemn. But in allowing the costs in that case it is said, that when the question of damages must be tried out as in an ordinary action at law, the general laws on the subject of costs will prevail; and, that being the situation here, respondents were entitled to their costs.

The judgment of the lower court is affirmed

AFFIRMED.

Argued October 18, decided October 26, 1909.

McCOY v. CROSSFIELD.

[104 Pac. 422.]

APPEAL AND ERROR—CROSS-APPEAL—FAILURE TO TAKE.

1. Where no cross-appeal is taken, respondent cannot be heard to question the sufficiency of the findings and decree of the court below, though the case is of an equitable nature.

PARTNERSHIP—PERSONAL LIABILITY—VIOLATION OF AGREEMENT.

2. Where a partner, in violation of an express agreement not to extend credit to relatives, advances money from the partnership funds or sells partnership goods to an impecunious relative, he is personally liable for the account.

PARTNERSHIP—DISSOLUTION—LIABILITY—PERSONAL ACCOUNT.

3. Where, upon the dissolution of a partnership, one of the partners was indebted to the firm upon his private account, he was chargeable with the full amount of the debt, notwithstanding the fact that the purchaser, at the receiver's sale of the assets and accounts of the firm, was the other partner.

From Sherman: EDWIN V. LITTLEFIELD, Judge.

This is a suit by E. O. McCoy against George N. Crossfield for an accounting and dissolution of partnership. Defendant being dissatisfied with the decree rendered in the circuit court, appeals. There was a motion to dismiss the appeal on account of the failure of appellant to file his abstract, as required by the statute and rules

of this court. By agreement the motion was heard, together with the argument, on the merits. **AFFIRMED.**

For appellant there was a brief with an oral argument by *Mr. John B. Hosford*.

For respondent there a brief over the names of *Messrs. Huntington & Wilson*, with an oral argument by *Mr. Bela S. Huntington*.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

We think that defendant has sufficiently excused his failure to file the abstract in this case, and the motion to dismiss will, therefore, be overruled.

1. Plaintiff contends that, as equity cases are, by statute, tried *de novo* in this court, he is entitled to ask for a decree in his favor for a greater sum than was allowed in the court below, and much of the discussion here has been in regard to items claimed by plaintiff and disallowed by the lower court. Plaintiff took no cross-appeal, and under the previous holding of this court, to which we still adhere, he cannot be heard to question the sufficiency of the decree, but must be deemed satisfied with the findings and decree below. *Shook v. Colohan*, 12 Or. 239 (6 Pac. 503); *Shirley v. Burch*, 16 Or. 83 (18 Pac. 351; 8 Am. St. Rep. 273); *Thornton v. Krimbel*, 28 Or. 271 (42 Pac. 995); *Cooper v. Thomason*, 30 Or. 162 (45 Pac. 296); *Goldsmith v. Elwert*, 31 Or. 539 (50 Pac. 867); *Board of Regents v. Hutchinson*, 46 Or. 57 (78 Pac. 1028).

2. This brings us to a consideration of the objections made by defendant to the findings of the court below. One objection is to the finding, charging defendant with the balance of an account owing to the firm by J. B. Crossfield, defendant's father. The testimony of plaintiff was to the effect that defendant agreed, at the time the partnership was formed, that he would conduct the business according to plaintiff's wishes. This seems reasonable, in view of the fact that defendant had very little capital, and plaintiff was a man of considerable

wealth, whose name alone was sufficient guaranty that the firm's obligations would be met. It is evident that what business standing the Oregon Trading Company had, was, to a great extent, due to plaintiff's connection with the business. Plaintiff testifies that he and defendant agreed that they would not credit relatives, and if, in violation of that express agreement, defendant saw fit to advance money from the partnership funds or sell partnership goods to an impecunious relative, the court violated no rule in equity in holding him accountable for his violation of the partnership agreement.

3. The next objection is that the court erred in charging defendant with the whole of his own private account with the firm, instead of only one half of it. A large part of defendant's private account had not been charged upon the books. Whether this was the fault of defendant or the negligence of the bookkeeper is not material, as it is conceded that the court found correctly the amount of these purchases. The firm was insolvent, and plaintiff became a purchaser, at the receiver's sale, of the assets and accounts of the firm. Beyond question the account of defendant passed by this sale, and plaintiff had the same right to enforce it against him as any other person buying it would have had. If there had been no sale of assets, the same result would have ensued. Upon a dissolution, each partner becomes chargeable with all the debts and claims he owes or is accountable for, to the partnership, with all interest accruing upon the same debts and claims. Story, Partnership, (5 ed.) § 348; *Phelan v. Hutchinson*, 62 N. C. 116 (93 Am. Dec. 602).

The decree of the lower court is affirmed.

AFFIRMED.

Submitted on briefs October 26, decided November 9, 1900.

WILLETT v. KINNEY.

[104 Pac. 719.]

LOGS AND LOGGING—LIENS—CONVERSION OF LOGS—ACTIONS—PLEADING.

1. Under Section 87, B. & C. Comp., providing that in pleading a judgment facts conferring jurisdiction need not be stated, a complaint based on Section 5602, making a person rendering impossible of identification logs on which there is a lien liable to the lienholder, which alleges that the lien on the logs was duly foreclosed in a suit instituted for that purpose, need not allege the facts showing the validity of the lien; the validity having been presumably established.

LOGS AND LOGGING—LIENS—CONVERSION OF LOGS—ACTIONS—PLEADING.

2. A complaint based on Section 5602, B. & C. Comp., making a person who, without the consent of the lien claimant, renders impossible of identification any logs on which there is a lien liable to the lienholder, which alleges that defendants, fraudulently conniving, conspiring, and confederating to cheat and defraud plaintiff out of his labor and lien security, destroyed and removed all of the logs and rendered the same impossible of identification, and appropriated the same to their own use, sufficiently negatives the consent of plaintiff to the removal as against a demurrer.

APPEAL AND ERROR—DENIAL OF MOTION FOR NONSUIT—REVIEW.

3. The denial of a judgment of nonsuit will not be reviewed on appeal unless it appears from the bill of exceptions that all the testimony offered at the time the motion for nonsuit was interposed has been brought up for examination, and, when this is not done, it will be presumed in favor of the judgment that there was sufficient evidence to warrant a submission.

EVIDENCE—SUFFICIENCY.

4. A plaintiff having the burden of proof in a civil action must introduce such testimony as will reasonably show his right of recovery, but he need not prove his case beyond a reasonable doubt, and, where the evidence produced by the respective parties does not preponderate in favor of plaintiff, the jury must find for defendant.

EVIDENCE—SUFFICIENCY.

5. Where the evidence is equally balanced, or so close as to make it doubtful which party has presented the greater weight of evidence, the verdict should be against the party having the burden of proof, but the mere fact that the evidence of plaintiff leaves the jury in doubt as to what the amount of the verdict should be, does not require a finding for defendant.

LOGS AND LOGGING—LIENS ON LOGS.

6. Under Section 5602, B. & C. Comp., making one rendering impossible of identification logs on which there is a lien liable to the lienholder for damages to the extent of the sum secured, a defendant appropriating to his own use logs subject to a lien in favor of another, and the value of the logs exceed or equal the value of the lien, is liable to the lienholder.

From Coos: JAMES W. HAMILTON, Judge.

Statement by MR CHIEF JUSTICE MOORE.

This is an action by W. E. Willett to recover damages for the alleged removal of personal property that was

subject to a logger's lien. The complaint averred, in effect, that at all the times stated therein the defendants, E. M. Ward and Fred Hollister, were partners under the firm name of the Ward Logging Company; that an agreement was consummated whereby the defendant, L. D. Kinney, stipulated to pay plaintiff \$1 per 1,000 feet for cutting saw logs from certain land in Coos County, and a like sum per 100 lineal feet for cutting piles therefrom; that pursuant to such contract, the plaintiff between February 7, 1908, and March 21st of that year, cut from the land specified, saw logs and piles, stating the quantity of each, for which Kinney promised to pay him \$104, but had only discharged \$21 thereof; that \$83 thereby remained due, to secure the payment of which the plaintiff on or about April 21, 1908, filed a verified claim of lien on the logs and piles so cut, which notice was duly recorded; that, in October, 1908, by consideration of the circuit court of that county, in a suit by the plaintiff herein against the defendant Kinney, a decree was duly rendered foreclosing the lien, and there was then determined to be due Willett thereon the sum of \$128.50, including costs and disbursements, of which decree the plaintiff is the owner; that no part of the sum so awarded has been paid; that by virtue of the labor so performed, and of the filing, recording, and foreclosing of the lien, the plaintiff is the owner of a special interest in the logs and piles to the extent of \$128.50; that such timber was then reasonably worth a sum largely in excess of all lien claims thereon; that the defendants, fraudulently conspiring to cheat, wrong, and defraud the plaintiff, removed all of such logs and piles, rendering the same impossible of identification, whereby the plaintiff was damaged in the sum of \$128.50.

A demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, was overruled, whereupon Ward and Hollister filed an answer which denied the material averments of the com-

plaint, and for a separate defense alleged that after April, 1908, Ward bought of Kinney, who was the owner thereof, the logs and piles described in the complaint; that Ward agreed with Kinney and the plaintiff herein, and also with F. T. Barton, who claimed some interest in the timber, to pay for all the timber which he should take, the stipulated prices for cutting the logs and piles; that he received certain quantities thereof valued at \$51.28, one half of which sum was due the plaintiff and the remainder belonged to Barton, and on account of which the plaintiff had received all but \$8.28, which prior to the commencement of this action was tendered to him, and a like sum offered to Barton, but each refused to accept the same.

A reply put in issue the allegations of new matter in the answer, and, the cause being tried, judgment was rendered as demanded in the complaint, and the defendants, who filed an answer, appeal. **AFFIRMED.**

For appellant there was a brief with oral arguments by *Mr. J. H. Guerry* and *Mr. A. H. Dalrymple*.

For respondent there was a brief with an oral argument by *Mr. N. C. McLeod*.

Opinion by MR. CHIEF JUSTICE MOORE.

It is contended that an error was committed in overruling the demurrer. This action is based on a clause of the statute which provides generally, that if any person without the express consent of the lien claimant, render impossible of identification any saw logs or piles upon which there is a lien, such person shall be liable to the lienholder for damages to the extent of the sum so secured. Section 5692, B. & C. Comp. It is argued that the complaint having stated that the plaintiff between February 7, 1908, and March 21st of that year, performed labor in cutting saw logs and piles, he must necessarily have finished his work on the timber on or before March 20, 1908, and, as the plaintiff's primary pleading avers that the

lien was filed on or before April 21, 1908, the allegation does not show that the notice was filed within the 30 days prescribed (Section 5683, B. & C. Comp.), nor is it averred that the acts complained of were done "without the express consent of the person entitled to such lien," as required by the statute (Section 5692, B. & C. Comp.), and hence the demurrer should have been sustained.

1. It will be remembered that the complaint alleges that the lien was duly foreclosed in a suit instituted for that purpose from which averment, in an independent action, it will be inferred that the validity of the lien was thereby established (Section 87, B. & C. Comp.), and hence it was unnecessary to set forth in the complaint the facts which the law inferred. Bliss, Code Plead. § 176; *Rutenic v. Hamakar*, 40 Or. 444, 450 (67 Pac. 196).

2. It must be admitted that the complaint should have been framed in conformity with the language of the statute, and averred that the logs and piles were removed by the defendants "without the express consent of the person entitled to such lien." Section 5692, B. & C. Comp. The allegation, however, in the complaint that the defendants, "fraudulently conniving, conspiring and confederating * * to cheat, wrong and defraud this plaintiff out of his labor and lien security, did injure, impair, destroy, and remove all of said saw logs and piling, and rendered the same impossible of identification, and appropriated the same to their own use," etc., negatives such consent, and tenders an issue on that subject. No error was committed in overruling the demurrer.

3. It is maintained that an error was committed in refusing to grant a judgment of nonsuit. The bill of exceptions does not purport to contain all the evidence given at the trial, but only the substance thereof. The rule is settled in this State that the action of a trial court in denying a motion for a judgment of nonsuit will not

be reviewed on appeal, unless it affirmatively appears from the bill of exceptions that all the testimony introduced at the time the motion was interposed has been brought up for examination, and, when this is not done, it will be presumed in favor of the judgment of the lower court that there was sufficient evidence to warrant a submission. *Schaefer v. Stein*, 29 Or. 147 (45 Pac. 301); *Thomas v. Bowen*, 29 Or. 258 (45 Pac. 768); *First Nat. Bank v. Fire Association*, 33 Or. 172, 193 (50 Pac. 568; 53 Pac. 8); *Carney v. Duniway*, 35 Or. 131, 135 (57 Pac. 192; 58 Pac. 105).

4. It is insisted that errors were committed in refusing to charge the jury as requested, to wit: (1) "It is the duty of the plaintiff to present such evidence to the jury as will make clear his right to recover." (2) "If the evidence of the plaintiff leaves the jury in doubt as to what the amount of the verdict should be, then you should find for the defendants." (3) "If you should not be able to determine from the evidence beyond a reasonable doubt as to what the amount of the verdict should be, then you should find for the defendants." The burden of proof was imposed on the plaintiff, making it incumbent upon him to introduce such testimony as would reasonably show his right of recovery. If the evidence produced by the respective parties does not preponderate in favor of the plaintiff, the jury should find for the defendants.

5. In the trial of civil actions, though the verdict is necessarily based on the weight of the evidence, the plaintiff, unless his cause of action is admitted by the answer, is required to introduce testimony which reasonably tends to show a right to recover his demand or some part thereof. Absolute certainty is rarely possible when the determination of an issue rests upon testimony, and, this being so, the omission of the word "reasonably" as qualifying the phrase "will make clear," as used in the first request, makes the demand for that part of the charge

objectionable, and no error was committed in refusing to give it.

"If the evidence," says a text-writer, "is equally balanced, or so close as to make it doubtful which party has presented the greater weight of evidence, then the verdict should be against the party on whom rests the burden of proof, and the refusal to give an instruction to that effect when properly requested, is error." Hughes, *Inst. to Juries*, § 202.

An examination of the second requested instruction will show that the language suggested does not come within the legal principle quoted, and no error was committed in denying the request. The third request demands a measure of proof "beyond a reasonable doubt," which degree of evidence is not required in the trial of civil actions, and hence the petition for the instruction was properly denied.

6. An exception having been taken to the following part of the court's charge, it is argued that an error was committed in instructing the jury as follows:

"If you should find from the evidence that the defendants appropriated to their own use a sufficient number of the logs mentioned in said complaint to amount to a sum of more or equal value to the judgment rendered in favor of plaintiff against L. D. Kinney on the foreclosure of his lien, then you will find a verdict for the plaintiff, provided you find that the logs were those subject to the lien of plaintiff as in the complaint alleged."

This instruction is within the issues, is compatible with the plaintiff's theory of the case, and complies with the provisions of the statute (Section 5692, B. & C. Comp.), and no error was committed in this respect.

Other errors are assigned; but, deeming them unimportant, the judgment is affirmed.

AFFIRMED.

Argued October 14, decided November 9, 1909.

FETTING v. WINCH.

[104 Pac. 722.]

EXECUTORS AND ADMINISTRATORS—TORTS—LIABILITY.

1. An action does not lie against an executor or administrator in his representative character for a wrongful act committed by him while administering the estate, whereby a personal injury is inflicted on another, but he must be sued as an individual, and a judgment against him personally must rest either on the principle of *respondeat superior* or on the breach of some duty amounting to actionable negligence, or on his independent tort.

MASTER AND SERVANT—"RESPONDEAT SUPERIOR."

2. The maxim of "*respondeat superior*" means that a master is responsible for the acts of his servants where the particular act causing the injury is within the scope, and is done in the exercise, of the servant's delegated authority. The test of the existence of the relation of master and servant is found in the exercise of authority in appointing the servant, in directing his acts, in receiving the benefits of his acts, and in reserving the power of dismissal.

EXECUTORS AND ADMINISTRATORS—FAILURE TO DISCHARGE DUTIES—LIABILITY.

3. An executor or administrator who neglects to discharge an obligation imposed by law, and thereby injures another, is personally liable therefor.

EXECUTORS AND ADMINISTRATORS—FAILURE TO DISCHARGE DUTIES—LIABILITY.

4. An executor or administrator is personally liable for the torts committed while administering the estate.

EXECUTORS AND ADMINISTRATORS—FAILURE TO DISCHARGE DUTIES—LIABILITY.

5. An executor in possession of a building for the estate employed a head janitor, who engaged two assistants. One of the assistants was killed, while the other assistant operated the elevator in the building. The head janitor, who was an experienced elevator operator, abandoned the work, and negligently placed one of his assistants in charge thereof. There was nothing to show that the executor derived or expected to receive any advantage from the employment of the head janitor or his assistants. There was no defect in the elevator or machinery connected therewith. *Held*, that the executor was not personally liable for the death of the assistant janitor.

From Multnomah: EARL C. BRONAUGH, Judge.

Statement by MR. CHIEF JUSTICE MOORE.

This is an action by Margaret Fetting, as administratrix of the estate of her husband, William F. Fetting, deceased, against Martin Winch, to recover damages resulting from the death of her spouse. The facts admitted by the pleadings or disclosed by the testimony are that Amanda Reed died testate, seised of real property of Third street, in the city of Portland, and also

was the owner of the structure thereon known as the "Abington Building." She designated as the executor of her last will, the defendant, who duly qualified as such, and took and retained the possession and control of such building. He leased the rooms in the upper stories thereof to persons for whose accommodation an elevator, propelled by electricity, was maintained. The power was applied by a person in the cage, who, by shifting a lever, caused it to come in contact with one or the other wires of a loop which extended over pulleys at the top and bottom of the elevator shaft, thereby throwing the magnets in touch, raising one wire and lowering the other a short distance, and impelling the machinery in the desired direction. Winch undertook to keep the rooms in the upper stories cleanly, and for that purpose employed Neils Mathison as head janitor; the latter engaging as his assistants Fetting and William Reynolds. In addition to the work usually performed by the under janitors, each alternately operated the elevator about two hours in the evening, when the ringing of a bell in the cage announced that some person desired to go to, or depart from some of the apartments. All the janitors on June 30, 1907, were engaged in cleaning the elevator shaft, standing on the top of the cage, and performing the work as they descended. Mathison operated the machinery by moving the wire loop up or down with his hands, dropping the elevator gradually by stations as his assistants dusted and washed the walls. When the cage reached the second floor, Mathison got off, after having informed Reynolds how to change the wires so as to go down, to stop the machinery and to remain stationary. In a few minutes after Mathison left the elevator, Reynolds inquired of Fetting if his part of the work was finished so as to descend, and, having received an affirmative answer, Reynolds moved the wire loop, bringing the cage to the proper place, but, when he attempted to stop the machinery, the elevator suddenly

went to the top of the building, where it remained. He got off and discovered that Fetting was not on the cage, but found him at the bottom of the elevator shaft; and about two hours thereafter he died. Fetting had been engaged as a janitor at the Abington building about six months and Reynolds eighteen days prior to the accident. Reynolds had no knowledge of the management of an elevator except such as he had acquired when operating the cage with the lever on alternate nights. Until Mathison left the cage the help was ample for the work required of the janitors where Fetting was injured. The complaint alleged that Winch was in the exclusive possession of the Abington building, and invested Mathison, who "was a skillful and experienced elevator operator and could safely operate the elevator from the top," with authority to select, employ and discharge assistants, thereby making him the agent and personal representative of the defendant; that Mathison carelessly abandoned the elevator and negligently placed in charge thereof Reynolds, who had no experience in controlling the machinery, which fact was known to the head janitor, but was unknown to Fetting; and that be reason of Reynolds' incompetency safely to operate the elevator from the top, and his lack of knowledge and skill in managing the cage, he lost control thereof, causing Fetting to miss his balance and to be precipitated to the bottom of the shaft, whereby he was injured and in consequence of which he died, setting forth the facts in substance as hereinbefore detailed. No reference is made in the complaint to the appointment or qualifications of the defendant as executor, a recovery being demanded against him personally. The answer averred such relation, that Mrs. Reed died seised of the Abington building, and that on June 30, 1907, the defendant was in possession thereof "for the said estate"; which facts are admitted by the reply. The cause coming on for trial, the

plaintiff introduced her evidence and rested, whereupon a judgment of nonsuit was rendered, and she appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Enoch B. Dufur*.

For respondent there was a brief over the names of *Messrs. Hogue & Wilbur* and *Mr. John M. Gearin*, with oral arguments by *Mr. Ralph W. Wilbur* and *Mr. Gearin*.

Opinion by MR. CHIEF JUSTICE MOORE.

1. The question to be considered is whether or not a recovery can be had against an executor based on the evidence given at the trial. An action cannot be maintained against an executor or an administrator in his representative character while administering the estate, for a wrongful act committed by him, whereby a personal injury is inflicted upon another. If liable at all, as the act is beyond the scope of his official authority, he must be sued, as in the case at bar, as an individual. Schouler's Ex. & Adm'r, § 385; 11 Am. & Eng. Enc. Law, (2 ed.) 942; 18 Cyc. 883. A judgment against an executor personally for damages sustained on account of a personal injury must rest either on the principle of *respondeat superior* or on the breach of some duty amounting to actionable negligence; or on his independent tort.

2. "The maxim of *respondeat superior*," says Lord Chief Justice BEST in *Hall v. Smith*, 2 Bing, 156, 160, "is bottomed on this principle: That he who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it." The editors of the National Reporter System, in their valuable work, Words and Phrases (volume 7, p. 6177), say: "The maxim of *respondeat superior* means that a master is responsible for the acts of its servants if the particular act causing the injury be within the scope of, and be done in the exercise of

the servant's delegated authority. The test of the existence of the relation of master and servant is found in the exercise of authority in appointing the servant, in directing his acts, in receiving the benefits of his acts, and in reserving the power of dismissal"—citing in support thereof the case of *Southern Ry. Co. v. Morrison*, 105 Ga. 543 (31 S. E. 564, 566).

3. In the case at bar the pleadings admit that on June 30, 1907, the defendant, as executor, managed the estate of Amanda Reed under the authority of the county court of Multnomah County, and was in possession of the building "for the said estate." No testimony was offered tending to show that Winch was managing the building or leasing any of the rooms therein for his own benefit, or that he derived or expected to receive any advantage, profit, or emolument whatever from the employment of the head janitor or of his assistants. In the absence of such evidence, it cannot be legally said that the defendant is individually liable for Mathison's act in leaving the elevator and in appointing Reynolds to operate it.

When the law imposes a duty on an administrator or an executor, and he neglects to discharge the obligation thus enjoined, whereby another sustains an injury, the personal representative is liable therefor. Thus in *Blevin's Ex'rs v. French*, 84 Va. 81, 84 (3 S. E. 891), a hotel was devised to executors, who, as trustees were directed by the will to keep the building in repair. Between the curbing on the premises and the entrance to the hotel was a cellarway covered by an area light, composed of glass and iron. French, who was an expressman, was carrying a trunk from the sidewalk into the hotel, when the area light gave way under him, and he fell and was injured. To recover the damages sustained he instituted an action, alleging that executors, being possessed of the premises, negligently permitted the cellarway to become and remain deficiently covered, where-

by he was injured. He obtained a judgment, which was affirmed on appeal; the court saying: "It was the duty of the defendant to keep the area light in a safe and secure condition, and this duty, without any sufficient excuse, they failed to perform."

So, too, in *Boston Beef Packing Co. v. Stephens*, (C. C.) 12 Fed. 279, 280, the defendants, as executors and trustees under a will, leased a building to be used as a storage warehouse, which structure at the time of the demise was unfit and unsafe for that purpose, and which, in consequence of such use of the tenants, fell, injuring the plaintiff's adjoining building, and it was determined that the defendants were personally amenable, the court saying: "They were held liable only to the extent that for their own profit they authorized and sanctioned the acts of the tenants in the use and control of their property." Farther in the opinion it is observed: "Whoever for his own advantage authorizes his property to be used by another in such manner as to endanger and injure unnecessarily, the property or rights of others, is answerable for the consequences." In *Donohue v. Kendall*, 50 N. Y. Super. Ct. 386, 390, the defendants, who were executors, leased to the plaintiff some rooms in the upper part of the house with the right to use a part of the cellar. Access to such basement was had by a stairway from which one step was gone. In descending such stairway the plaintiff fell and was injured because of the absence of the step. She commenced an action to recover the damages sustained, and, having secured a judgment personally against the defendant, it was affirmed. In an agreeing opinion, Judge TRUAX says: "The statute * * placed upon defendants the duty of keeping the stairs in good repair. This duty they failed to perform. For this reason I concur." It would seem that the decision last noted was affirmed without an opinion (*Donohue v. Kendall*, 98 N. Y. 635), though

there is a discrepancy as to the time when the former judgment purports to have been given.

4. There was no patent or latent defect in the elevator, the machinery, or in anything connected therewith in the Abington building that the defendant failed to inspect or to keep in proper repair; and hence he cannot be charged with a breach of duty which the law enjoined, in consequence of which the injury resulted. An executor or an administrator, while administering a decedent's estate, is personally liable for the torts which he may commit whereby another sustains damages. Thus in *Newsum v. Newsum*, 1 Leigh. (Va.) 86 (19 Am. Dec. 739), an administrator sold a slave, the property of others, as a part of an intestate's estate, and applied the proceeds in payment of the debts of the estate without notice of the rights of the true owners, and it was held that he was personally liable in trover by such owners. In *Plimpton v. Richards*, 59 Me. 115, an action was instituted against the defendants "as executors," to recover damages caused by raising a dam whereby the water of a stream overflowed the plaintiff's land, and it was ruled that the action would not lie; thereby impliedly holding that an executor was personally liable for a tort which he had committed. In *Mason v. Rhineland*, 8 Ben. 163 (Fed. Cas. N. 9,251), an executor leased land belonging to an estate which abutted on navigable water, reserving to himself the right to build a bulkhead on the premises. He subsequently constructed the bulkhead in such a manner that a timber projected under the surface of the water out of sight. A canal boat lying at the bulkhead, when the tide fell, was so injured by the protruding log that it sank, and it was held that the executor was personally liable for the damages caused by the faulty construction of the bulkhead. The torts referred to in the three cases last noted evidently resulted from the active participation of an executor or an administrator, thereby

rendering him personally liable for the damages which followed from his willful or negligent act.

5. In *Deschler v. Franklin*, 20 Ohio Cir. Ct. R. 56, 57, it was ruled that where a person was injured by the negligence of the operator while riding in a passenger elevator in an office building, the property of an estate managed and controlled by an executor, such injured person cannot recover damages for such injury in an action against the executor in his representative capacity. In this case the plaintiff was injured by the negligence of a servant, who was employed by the executor to operate the elevator. In deciding that case, the court, in referring to the defendant, said: "If any cause of action arises through his negligence in managing the estate, it must be against him personally, and not against him in his representative capacity." In *McCue v. Finck*, 20 Misc. Rep. 506 (46 N. Y. Supp. 242), the plaintiff was injured by a truck driven by an employee of the defendants, who were executrix and executor, respectively, of a decedent's estate. In an action against the defendants in their representative capacity, it was ruled that no recovery could be had. In deciding that case it is said: "The executrix died after suit was brought, and, if any cause of action existed against her, it abated on her death." Further in the opinion it is observed: "The objection taken to the form of the complaint requires that it should be amended by continuing the action against August Finck individually, with appropriate allegations to charge him in some legal form with the negligence complained of." From the two cases last noted it would seem that a recovery could be had against an executor or an administrator personally of the damages sustained by another in consequence of the negligence of a servant of such personal representative. If, in those cases, the executor or administrator had expected to derive some advantage from the employees' labor, so as to make the

maxim of *respondeat superior* applicable, we admit that the conclusions thus reached are controlling. In the case at bar the evidence does not show any active negligence on the part of Winch that would render him amenable for the damages caused by the carelessness of a servant whom the complaint alleges was competent. As the defendant's liability is personal, he ought not to be held responsible unless he has been negligent in the discharge of some duty or obligation which he owed to Fetting.

Believing that the evidence offered at the trial was insufficient to establish such liability, and that no error was committed in granting the nonsuit, the judgment is affirmed.

AFFIRMED.

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7. Since an order of the trial court, made after an appeal was perfected, setting aside the notice of appeal, etc., is a nullity, the failure to file a transcript within the time prescribed after perfecting the appeal operates as an abandonment of the appeal.—*Hanley v. Stewart*, 38.

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8. The abstract on appeal, showing verdict was rendered November 9th (by mistake for December 9th), contained a journal entry that on December 19th plaintiff's motion "to set aside the verdict * * and the judgment entered thereon" was denied, and thereupon plaintiffs in open court gave notice; also a journal entry that on December 19th, the verdict having been returned that day, judgment was rendered for defendant. *Held*, that from the recital that the motion was to set aside the judgment, as well as the verdict, and the presumption that the court, as was its duty under Section 201, B. & C. Comp., as amended by Laws 1907, p. 812, § 4, gave judgment on the day verdict was returned, there was no doubt that the judgment was not given or entered

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APPEAL AND ERROR—EVIDENCE—TRANSCRIPT ON APPEAL.

12. Where it is contended that the evidence was not sufficient to justify the verdict, the transcript on appeal must show the objections to be well taken, otherwise the court will not devote the time nor occupy the space to discuss it.—*State v. Minnick*, 88.

APPEAL AND ERROR—NOTICE OF APPEAL—SUFFICIENCY.

13. Under Laws 1899, p. 228, and Laws 1901, p. 77, declaring that a notice of appeal shall be sufficient if it contains the title of the cause, the names of the parties, and notice to the adverse party or his attorney that an appeal is taken to the supreme or circuit court, as the case may be, from the judgment, order, decree, or some specific part thereof, a notice that defendant Emma G. Robinson appeals from all of the judgment and decree, excepting those portions adjudging to the appealing defendant liens on the property described in the decree, and that among the particular portions of the judgment and decree from which this defendant appeals are those adjudging liens for any sums in favor of plaintiffs or any of them against such property and from those portions giving judgment for any sum against this defendant, was sufficient.—*Anderson v. Phegley*, 102.

APPEAL AND ERROR—APPEAL BOND—CONDITIONS.

14. Where, in a suit to foreclose certain contracts constituting an equitable mortgage on mining property, the court fixed the value of the use of the land, and the amount so fixed was included in the undertaking of appeal, it was not defective because it did not also secure the performance of the assessment work required by the laws of the United States in order to save the property from forfeiture, pending appeal.—*Anderson v. Phegley*, 102.

APPEAL AND ERROR—SUPERSEDEAS.

15. An appeal, though not perfected until the expiration of the time for objections to the sufficiency of the sureties, operated as a supersedeas from the date of its service and filing.—*Anderson v. Phegley*, 102.

APPEAL AND ERROR—SUPERSEDEAS—EFFECT.

16. Where, in a suit to foreclose an equitable mortgage on mining property, one of the defendants perfected an appeal before sale, the sheriff should have continued the sale until after the time limited for objections to appellant's sureties, and then, in default of such objections, should have released the property.—*Anderson v. Phegley*, 102.

APPEAL AND ERROR—SUPERSEDEAS—SALE AFTER APPEAL.

17. A sale under a foreclosure decree and an order confirming same after the perfection of an appeal by one of the defendants are invalid.—*Anderson v. Phegley*, 102.

APPEAL AND ERROR—BILL OF EXCEPTIONS—CONCLUSIVENESS.

18. The court on appeal is bound by the bill of exceptions, and cannot look outside of that to ascertain what took place.—*Russell v. Oregon R. & N. Co.* 128.

APPEAL AND ERROR—REVIEW—SUBSEQUENT APPEAL.

19. Where it was held on a former appeal that the defense of adverse possession was not sustained by the evidence, and the evidence on the second trial was no stronger in defendant's favor, that defense will not be further considered on the subsequent appeal.—*Seabrook v. Coos Bay Ice Co.* 172.

APPEAL AND ERROR—JUDGMENTS APPEALABLE—FINALITY.

20. A judgment in condemnation proceedings that the land sought to be taken is appropriated and taken from defendant by plaintiff on the deposit by plaintiff of a specified sum, and without reserving anything for the court's further determination, is a final judgment, and appealable, though plaintiff did not make any deposit.—*Oregon R. & N. Co. v. Eastlack*, 196.

APPEAL AND ERROR—JUDGMENTS APPEALABLE—VOID JUDGMENTS.

21. A void judgment, entered at a time when the court is without jurisdiction to award it, is reviewable on appeal.—*Oregon R. & N. Co. v. Eastlack*, 196.

APPEAL—DEFECTS IN TRANSCRIPTS—CORRECTION—TIME.

22. Under rule 35, 20 Or. 587 (91 Pac. XII), providing that, for the purpose of correcting any defect in the transcript from the court below, either party may suggest the same, and on good cause shown obtain an order on the proper clerk certifying the whole or part of the record as may be required, an application for an order to supply the record will be granted, although not made until after the motion to dismiss the appeal has been submitted.—*Ferrari v. Beaver Hill Coal Co.* 210.

APPEAL—NOTICE—SUFFICIENCY.

23. Under Section 515, B. & C. Comp., providing that a notice is valid, though defective as to the name of the court, etc., if it intelligibly refers to the action, a notice of appeal which intelligibly referred to the action in which the appeal was taken was valid, though it was entitled in the Circuit Court of the United States for a certain county instead of in the circuit court of such county.—*Ferrari v. Beaver Hill Coal Co.* 210.

APPEAL—MOTION TO DISMISS—QUESTIONS REVIEWABLE.

24. The Supreme Court will not on motion to dismiss an appeal review the action of the trial judge in permitting the undertaking on appeal to be filed after the expiration of the time allowed by law.—*Ferrari v. Beaver Hill Coal Co.* 210.

APPEAL AND ERROR—RECORD—AMENDMENT—AUTHORITY OF TRIAL COURT.

25. The trial court may, on application therefor, and notice thereof to the adverse party, make an alteration in the original bill of exceptions, provided the amendment is duly made, properly certified, and filed in the Supreme Court before the rendition of a decision on the merits.—*Ferrari v. Beaver Hill Coal Co.* 210.

APPEAL AND ERROR—OBJECTIONS—REVIEW.

26. Objections, to be available on appeal, must be on the ground on which the error is predicated.—*Ferrari v. Beaver Hill Coal Co.* 210.

APPEAL AND ERROR—QUESTIONS NOT RAISED BELOW—INSTRUCTIONS—REQUEST.

27. Though the evidence of a negligent act should have been taken from the jury, in the absence of a request therefor, no error could be predicated because of the failure to do so.—*Ferrari v. Beaver Hill Coal Co.* 210.

APPEAL AND ERROR—HARMLESS ERROR—EVIDENCE—INSTRUCTIONS.

28. Where the court, in an action by an infant for personal injuries, charged that no damages could be assessed for loss of time during minority, it would not be presumed that defendant was prejudiced by the testimony of plaintiff as to the length of time he was able to work after the injury and prior to the trial.—*Ferrari v. Beaver Hill Coal Co.* 210.

APPEAL AND ERROR—PREJUDICIAL ERROR—REFUSAL OF INSTRUCTIONS.

29. Where, in an action for injuries to a coal miner while operating cars on an incline, the safety of the incline was not treated as an issue at the trial, and the testimony that the incline was in a reasonably safe condition was not questioned, the refusal to charge that there was no testimony that the incline was not built in the usual manner, etc., was not prejudicial.—*Ferrari v. Beaver Hill Coal Co.* 210.

APPEAL AND ERROR—INSTRUCTIONS—REQUESTS—NECESSITY.

30. A party complaining of the instructions on the measure of damages, in an action for personal injuries, which correctly state the law as far as they go, must request additional instructions; and, in the absence of such request, he cannot urge omissions in the instructions as reversible error.—*Ferrari v. Beaver Hill Coal Co.* 210.

APPEAL AND ERROR—DISMISSAL AS TO CO-DEFENDANT.

31. A judgment against one defendant, in an action for negligence, treated during the trial as against such defendant alone, amounts to a dismissal as to

co-defendant, within Sections 180, 181, B. & C. Comp., and defendant, interposing no objection, is not prejudiced thereby.—*Ferrari v. Beaver Hill Coal Co.* 210.

APPEAL AND ERROR—BRIEFS—EXCUSE FOR FAILURE TO FILE.

82. Engagements in causes in other courts afford no excuse for failure to file briefs within the time prescribed by the rules of court.—*Flanagan v. Jones*, 271.

APPEAL AND ERROR—TIME TO FILE BRIEF—EXCUSE FOR FAILURE.

83. The failure of appellant to file his brief, due under rule 37, 50 Or. 588 (91 Pac. XII) on February 20th, until April 7th following, or to apply for an extension of time in which to file brief, is not excused by a showing of pressure of business on the part of his attorney and a delay of the printer in getting out the copy, and the judgment will be affirmed.—*Shafer v. Beecher*, 273.

APPEAL AND ERROR—APPEALABLE ORDERS—SUSTAINING DEMURRER.

84. An appeal does not lie from an order sustaining a demurrer to a complaint; such order not being a determination of the action.—*Giant Powder Co. v. Oregon Western Ry. Co.* 323.

APPEAL AND ERROR—APPEALABLE ORDERS—"ACTION"—"SUIT"—"COMPLAINT."

85. A "suit" or "action" being "the lawful demand of one's right in a court of justice" while a "complaint" is, under Section 67, B. & C. Comp., a plain and concise statement of the facts constituting the cause of action or suit, the dismissal of the complaint on the sustaining of a demurrer thereto does not necessarily discharge the lawful demand so as to terminate the action and permit an appeal from the order of dismissal.—*Giant Powder Co. v. Oregon Western Ry. Co.* 323.

APPEAL AND ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE—PREJUDICIAL EFFECT.

86. In an action for commissions earned by the purchase of land for defendant, where plaintiff claimed that the agreement was to pay \$1 an acre when he secured options on the land and deposited the deeds for defendant, but defendant claimed that plaintiff was not to receive any commission unless he exercised the options and resold the land, error in admitting irrelevant testimony that defendant hired another to assist plaintiff, and promised to pay him a certain sum, was not prejudicial, where defendant testified that such compensation was also contingent upon his acceptance of the options and resale of the land, in view of defendant's contention as to the contract with plaintiff.—*Mahon v. Rankin*, 323.

APPEAL AND ERROR—HARMLESS ERROR—FAVORABLE TO COMPLAINING PARTY.

87. Error, in an instruction in assuming as a fact that the contract of agency was as contended by defendant, was favorable to him, and he cannot complain thereof.—*Mahon v. Rankin*, 323.

APPEAL—REVIEW OF INSTRUCTIONS—RECORD.

88. Where the evidence is not in the record, the court must assume that instructions correctly stating the law were justified by the evidence possible under the pleadings; but, where no possible state of the evidence justified the instructions, the giving of them was error.—*State v. Jancigaj*, 361.

APPEAL—OBJECTIONS TO INDICTMENT—WAIVER.

89. Under Section 1865, B. & C. Comp., providing "that the objection to the jurisdiction of the court over the subject-matter of the indictment, or that the facts stated do not constitute a crime, may be taken in the trial under a plea of not guilty, or in arrest of judgment," the objection that the facts stated in an indictment do not constitute a crime may be raised first in the appellate court, and is not waived by failing to demur or move in arrest of judgment in the trial court.—*State v. Martin*, 403.

APPEAL—REVIEW—ASSIGNMENT OF ERRORS.

40. The objections that the facts stated in an indictment do not constitute a crime, or that the trial court does not have jurisdiction of the offense, may be raised in the appellate court, though not assigned as errors.—*State v. Martin*, 403.

APPEAL—REVIEW—SCOPE—BILL OF EXCEPTIONS.

41. Where, on appeal from a conviction, there is no bill of exceptions, the sufficiency of the information is the only subject for review.—*State v. Martin*, 403.

APPEAL AND ERROR—REVIEW—TRIAL DE NOVO—EQUITY SUITS.

42. Equity suits are tried *de novo* on appeal.—*Morse v. Whitcomb*, 412.

APPEAL AND ERROR—SUFFICIENCY OF BILL OF EXCEPTIONS.

43. Under Section 171, B. & C. Comp., providing that "the objection shall be stated with so much of the evidence or other matter as is necessary to explain it, but no more," a bill of exceptions which consists only of the entire transcript of the stenographer's notes taken at the trial is sufficient to bring up for consideration the assignment of error that the court erred in denying defendant's motion for a nonsuit, and that it erred in refusing a motion for a directed verdict for defendants, as consideration of those assignments requires that the bill contain all the evidence before the court at the time the motion was made, but the bill is not sufficient to present other assignments of error.—*Bigelow v. Columbia Gold Mining Co.* 451.

APPEAL AND ERROR—BILL OF EXCEPTIONS—NECESSITY—WAIVER—POWER.

44. A bill of exceptions is required by statute, and not by court rules, so that counsel cannot waive a bill of exceptions, where it is necessary to raise the question presented for review, or stipulate to submit the case on a transcript of the evidence.—*Bigelow v. Columbia Gold Mining Co.* 451.

APPEAL AND ERROR—BRIEFS—STATEMENT OF FACTS—FAILURE TO DENY.

45. Respondent need not object to the statement of fact made in appellant's brief and does not assent thereto by his failure to deny.—*Bigelow v. Columbia Gold Mining Co.* 451.

APPEAL AND ERROR—FINDINGS—CONCLUSIVENESS.

46. A finding of the trial judge on conflicting testimony will not be disturbed on appeal.—*Patton v. Washington*, 479.

APPEAL—RIGHT TO ALLEGE ERROR.

47. Accused was not entitled to claim that the introduction of the record of his prosecution by deceased, for conduct unbecoming an attorney, which was the cause of the killing, was error, where he himself introduced the record of the preliminary hearing of the same charges before the grievance committee of the Bar Association, which was substantially the same as the record introduced by the State.—*State v. Finch*, 482.

APPEAL AND ERROR—PRESENTATION OF DEFENSE BELOW—LIMITATIONS.

48. Where a mortgage foreclosure trial proceeded until the close of the mortgagee's case without raising the issue of limitations, and the mortgagor's liability was conceded, the defense of limitations was waived, and an answer subsequently filed without leave of court, setting up the defense of limitations, must be disregarded on appeal, though a motion to strike out the answer was not allowed.—*Alexander v. Munroe*, 500.

APPEAL AND ERROR—INSTRUCTION—EXCEPTIONS BELOW.

49. Failure to instruct in a criminal case, as required by Section 16, Article I, Constitution of Oregon, held not assignable as error, unless exception was reserved.—*State v. Daley*, 514.

APPEAL AND ERROR—LAW OF THE CASE.

50. A judgment of an appellate court concerning a subject not in issue is void and subject to collateral attack, and may be disregarded by the trial court; but it cannot be so disregarded for fraud or mere irregularities.—*Taylor v. Taylor*, 500.

APPEAL AND ERROR—PRIOR APPELLATE DETERMINATION—LAW OF THE CASE.

51. Where, on appeal from a divorce decree, it was not suggested that the holding awarding certain property to the wife was in conflict or inconsistent with any of the issues, the decree of the Supreme Court, at the expiration of the time allowed for rehearing, was not subject to review on any other appeal, or in proceedings in any court in which the question might arise, but became the law of the case.—*Taylor v. Taylor*, 500.

APPEAL AND ERROR—MOTION FOR NONSUIT—REVIEW.

52. The denial of a motion for a nonsuit must be reviewed on appeal with reference to the entire record submitted, and must be affirmed if the proof adduced was admissible and discloses facts entitling the case to be submitted to the jury.—*Taylor v. Taylor*, 500.

APPEAL AND ERROR—"FINAL DECREE."

53. The "final decree" in partition, within Section 6, Article VII, Constitution of Oregon, limiting the review by the Supreme Court of decisions of the

circuit court to those that are final, is that entered on confirmation of the report of referees.—*Kesler v. Nice*, 585.

APPEAL AND ERROR—DISMISSAL—WANT OF JURISDICTION.

54. It being patent from the face of the record that the decree in partition is interlocutory, the court will of its own motion dismiss the appeal therefrom for want of jurisdiction.—*Kesler v. Nice*, 585.

APPEAL AND ERROR—CROSS-APPEAL—FAILURE TO TAKE.

55. Where no cross-appeal is taken, respondent cannot be heard to question the sufficiency of the findings and decree of the court below, though the case is of an equitable nature.—*McCoy v. Crossfield*, 591.

APPEAL AND ERROR—DENIAL OF MOTION FOR NONSUIT—REVIEW.

56. The denial of a judgment of nonsuit will not be reviewed on appeal unless it appears from the bill of exceptions that all the testimony offered at the time the motion for nonsuit was interposed has been brought up for examination, and, when this is not done, it will be presumed in favor of the judgment that there was sufficient evidence to warrant a submission.—*Willett v. Kinney*, 594.

APPEARANCE.

APPEARANCE—"SPECIAL APPEARANCE."

1. A "special appearance" is made by a party when he or his attorney seeks to obtain from the court an order vacating some proceeding which, it is insisted, has been undertaken by the adverse party in an unauthorized manner; such appearance being thus limited to prevent conferring jurisdiction of the person.—*Multnomah Lumber Co. v. Weston Basket Co.*, 22.

APPEARANCE—"GENERAL APPEARANCE."

2. A "general appearance" is the voluntary act of a party or his attorney, and is effectual to confer jurisdiction of the person without an order of court.—*Multnomah Lumber Co. v. Weston Basket Co.*, 22.

APPEARANCE—PROCEEDINGS CONSTITUTING APPEARANCE—STIPULATION.

3. A stipulation extending the time to answer in a suit against a foreign corporation signed by attorneys authorized to represent the parties and filed in court as required by Section 1068, B. & C. Comp., constitutes a "general appearance" within Sections 63, 528, 542, 1049, 1050, so as to subject the corporation to the jurisdiction of the court.—*Multnomah Lumber Co. v. Weston Basket Co.*, 22.

APPEARANCE—SERVICE OF SUMMONS—WAIVER.

4. A defendant waives his right to object to a judgment for want of proper service of summons by appearing and asking leave to answer to the merits.—*Anderson v. McClellan*, 205.

ASSESSMENT.

ASSESSMENT OF LAND FOR TAXES—DESIGNATION OF OWNER.

1. Land should be assessed to the holder of the apparent legal title, as required by Section 8067, B. & C. Comp., and an assessment to one not the owner is void.—*Bradford v. Durham*, 1.

ASSESSMENT—WHEN VOID.

2. An assessment of a tract of land at a lump sum to one who owns only a part of it is void.—*Bradford v. Durham*, 1.

ASSESSMENT—SALE FOR DELINQUENT TAXES—DEFECTS.

3. Failure of the sheriff to annex to his return of delinquent taxes on lands the affidavit that he can find no goods to satisfy the same, as required by Section 2411, Hill's Ann. Laws 1892, renders the tax title void.—*Bradford v. Durham*, 1.

Assessment for Expenses of Public Improvements. See MUNICIPAL CORPORATIONS, 3.

ASSIGNMENTS.

ASSIGNMENTS—EFFECT AS TRANSFERRING PERSONAL LIABILITY OF JUDGMENT DEBTOR.

1. An assignment of a part of a judgment adjudicating the personal liability of the judgment debtor, transfers to the assignee a portion of such personal liability.—*Alexander v. Munroe*, 500.

ASSIGNMENT OF ERROR.

See APPEAL AND ERROR.

ASSUMPTION OF RISK.

ASSUMPTION OF RISK—APPLICATION OF.

1. Where no contract relation existed between plaintiff, suing for a personal injury, and defendant, the doctrine of assumption of risk, as distinguished from contributory negligence, did not apply, unless plaintiff knew and appreciated the danger and voluntarily put himself in the way of it.—*Gentzkow v. Portland Railway Co.* 114.

ASSUMPTION OF RISK—NEGLIGENCE OF FELLOW SERVANT.

2. Plaintiff and the other workmen working on the engine being fellow servants, he assumed the risk of the other's negligence, if any, and the master's foreman owed no duty to caution each one to beware of the operations of the others.—*Brusel v. Oregon R. & N. Co.* 157.

ASSUMPTION OF RISK—NECESSARY INCIDENT OF EMPLOYMENT.

3. The removal of the hand rail being a necessary part of the labor to be done on the engine, the risk of injury from its absence was a risk assumed by plaintiff.—*Brasel v. Oregon R. & N. Co.* 157.

ASSUMPTION OF RISK—QUESTION FOR JURY.

4. Whether an infant coal miner assumed the risks incident to his employment, including the taking of defective cars to a shop, held, under the evidence, for the jury.—*Ferrari v. Beaver Hill Coal Co.*, 210.

ASSUMPTION OF RISK—MASTER AND SERVANT—INJURY TO SERVANT.

5. An infant servant assumes the ordinary hazards and risks of his employment that he, through his intelligence, knows, or should know and appreciate, and he assumes the dangers that are so open and obvious that one of his age, capacity, and experience would, in the exercise of ordinary care, know and appreciate.—*Ferrari v. Beaver Hill Coal Co.* 210.

See also MASTER AND SERVANT.

ATTACHMENT.

ATTACHMENT—VACATION—TRAVERSE.

1. A party seeking to discharge an attachment by a traverse of the facts alleged, must deny every statutory ground alleged in the procuring affidavit in as direct and explicit terms as if it were an answer to a complaint.—*Bowman v. Wade*, 347.

ATTACHMENT—"SECURED CLAIM"—MORTGAGE BY NON COMPOS MENTIS.

2. Where plaintiff's debt was secured by the mortgage of a person *non compos mentis*, it was not a "secured claim" within the statute authorizing attachment (Section 296, B. & C. Comp.), providing for attachment in an action on a contract, express or implied, for the payment of money not secured by mortgage, loan, or pledge on real or personal property, or, if so secured, when such has been rendered nugatory by the act of the defendant.—*Bowman v. Wade*, 347.

ATTORNEY AND CLIENT.

ATTORNEY AND CLIENT—RETAINER AND AUTHORITY.

1. An attorney being authorized by Section 1068, B. & C. Comp., to bind his client in any of the proceedings in a suit by his agreement filed in court, a general retainer authorizes an attorney to admit service of process whereby jurisdiction of the person of his client is conferred.—*Multnomah Lumber Co. v. Weston Basket Co.* 22.

ATTORNEY AND CLIENT—COMPENSATION—PROTECTION OF LIEN—REMEDY.

2. The remedy of an attorney receiving from his client, who had obtained a judgment against a third person for a specified sum, and who had instituted a suit to subject real estate to the payment of the judgment, a half interest in the judgment and in the security therefor claimed in the pending suit, is only in equity on his ceasing to represent the client and on the client satisfying the judgment pursuant to a fraudulent settlement with the third person.—*Alexander v. Munroe*, 500.

BILL OF EXCEPTIONS.

BILL OF EXCEPTIONS—AFFIDAVITS TO SET ASIDE SERVICE OF PROCESS—SCOPE AND CONTENTS.

1. Affidavits in support of a motion to set aside service of process, though included in the transcript, are no part of the record unless included in the bill of exceptions.—*Mullnomah Lumber Co. v. Weston Basket Co.* 22.

BILL OF EXCEPTIONS—CONCLUSIVENESS.

2. The court on appeal is bound by the bill of exceptions, and cannot look outside of that to ascertain what took place.—*Russell v. Oregon R. & N. Co.* 128.

BILL OF EXCEPTIONS, SUFFICIENCY OF.

3. Under Section 171, B. & O. Comp., providing that "the objection shall be stated with so much of the evidence or other matter as is necessary to explain it, but no more," a bill of exceptions which consists only of the entire transcript of the stenographer's notes taken at the trial is sufficient to bring up for consideration the assignment of error that the court erred in denying defendant's motion for a nonsuit, and that it erred in refusing a motion for a directed verdict for defendants, as consideration of those assignments requires that the bill contain all the evidence before the court at the time the motion was made, but the bill is not sufficient to present other assignments of error.—*Bigelow v. Columbia Gold Mining Co.* 452.

BILL OF EXCEPTIONS—NECESSITY—WAIVER—POWER.

4. A bill of exceptions is required by statute, and not by court rules, so that counsel cannot waive a bill of exceptions, where it is necessary to raise the question presented for review, or stipulate to submit the case on a transcript of the evidence.—*Bigelow v. Columbia Gold Mining Co.* 452.

BILL OF EXCEPTIONS—AFFIDAVITS—CONTINUANCE—DENIAL—DISCRETION.

5. Refusal of an application for a continuance will not be disturbed on appeal, except for abuse of discretion. Affidavits for continuance cannot be considered on appeal, unless made a part of the record by the bill of exceptions.—*State v. Finch*, 482.

BILLS AND NOTES.

BILLS AND NOTES—CONSIDERATION—PRIMA FACIE EVIDENCE.

A note itself is *prima facie* evidence of the consideration therefor.—*Alexander v. Munroe*, 500.

BOUNDARIES.

BOUNDARIES—ESTABLISHMENT—ACQUIESCENCE.

1. Where a government survey made according to Act September 27, 1850, c. 76 (9 U. S. Stat. 497), for the purpose of dividing a donation land claim between a husband and wife, has been acquiesced in for a long time, it is conclusive as to the location of the dividing line, and such line is not changed by the location of a quarter section line.—*Bernheim v. Talbot*, 30.

BOUNDARIES—ESTABLISHMENT—OFFICIAL SURVEY.

2. An east and west quarter section line is not necessarily the same as a division line between the north half and the south half of a donation land claim of a husband and wife divided by the Surveyor General according to a survey made under Act September 27, 1850, c. 76 (9 U. S. Stat. 497), because Rev. St. U. S. § 2306, requires section lines to be straight lines from the established corners to the opposite corresponding corners.—*Bernheim v. Talbot*, 30.

BOUNDARIES—ESTABLISHMENT—EVIDENCE.

3. The rule that in government surveys the first lines and corners are only temporary, and, if the metes and bounds do not close, correction back is made by dividing the error and moving the lines and corners before they are made permanent, does not apply in retracting permanent surveys to the extent of moving established boundaries so as to include land not within the government survey, and in ejectment evidence of such rule and the map of the premises involved, made on such theory, are not admissible.—*Seabrook v. Coos Bay Ice Co.* 172.

BOUNDARIES—LOCATION—EVIDENCE.

4. The location of the beginning point of a survey would not be regarded as established by the testimony of a witness, who was present when the survey was made, as to his recollection of its location, after the lapse of thirty-four years.—*Seabrook v. Coos Bay Ice Co.* 172.

BOUNDARIES—BEGINNING CORNER—LOCATION—EVIDENCE.

5. Evidence held to show that the northeast corner of a certain lot had not been properly located in the Whereat's survey, and could not, therefore, be taken as the starting point from which to locate an angle to which such survey was tied.—*Seabrook v. Coos Bay Ice Co.* 172.

BROKERS.**BROKERS—REAL ESTATE BROKERS—SCOPE OF AUTHORITY.**

1. A real estate agent is not ordinarily authorized to conclude or execute a contract of sale, but merely to find a purchaser for the owner, leaving the terms and conditions of sale to further negotiations between him and the purchaser.—*Flegel v. Dowling*, 40.

BROKERS—ACTIONS FOR COMPENSATION—ADMISSIBILITY OF EVIDENCE.

2. In an action for commissions, claimed to have been earned by purchasing land for defendant, where defendant claimed that plaintiff received a commission from the seller of a tract in violation of his relations as agent, which commission plaintiff claimed was received for defendant's benefit and by his authority, evidence was admissible of the employment and the extent of the authority of another, employed by defendant to assist plaintiff in securing the options, who, by plaintiff's direction, communicated to defendant the proposed terms for the purchase of the tract in question, but the compensation he was to receive from defendant was immaterial.—*Mahon v. Rankin*, 323.

BROKERS—AUTHORITY—QUESTION FOR JURY.

3. While the question of the authority of an agent is for the jury, where it is disputed, the court should declare whether a given act is in excess of the agent's authority, so that, in an action for commissions for purchasing land for defendant, the court properly instructed that any payments made by plaintiff to sellers in excess of the amount limited by defendant was without authority.—*Mahon v. Rankin*, 323.

BROKERS—ACTIONS—PLEADING—RATIFICATION.

4. In an action for commissions, claimed to have been earned by the purchase of land for defendant, where the latter claimed that plaintiff acted in violation of his agency by paying a higher price per acre than he was authorized, etc., allegations of the complaint that plaintiff notified defendant from time to time of the purchases, the purchase price, amounts of payments, etc., and defendant, knowing of the purchases and terms thereof, ratified them, as well as the allegations of the reply that the payments of the land in excess of the price thereof were made with defendant's knowledge, and ratified by him, sufficiently alleged ratification.—*Mahon v. Rankin*, 323.

BURDEN OF PROOF.**BURDEN OF PROOF—SALE FOR NONPAYMENT OF TAX—EVIDENCE AS TO VALIDITY.**

1. The burden of proving the validity of a tax sale held to be on the assignee of the certificate of sale.—*Rafferty v. Davis*, 77.

BURDEN OF PROOF—CONTRIBUTORY NEGLIGENCE.

2. The burden of proving contributory negligence is on defendant, and plaintiff need not show freedom from negligence.—*Gentzkow v. Portland Railway Co.* 114.

BURDEN OF PROOF—EVIDENCE—"PRESUMPTION."

3. Under Section 781, B. & C. Comp., defining a presumption as a deduction from particular facts, it will be presumed that, when an assault with intent to commit robbery is made by placing the muzzle of a pistol at or near the body of a person from whom money or property is expected to be taken by force, the weapon so employed is loaded with powder and ball, and is a dangerous weapon, and imposes upon the person accused, if he admit the use of the pistol, the burden of proving it was not so charged.—*State v. Parr*, 316.

BURDEN OF PROOF—PLEDGES—EVIDENCE AS TO CHARACTER OF TRANSACTION.

4. One admitting that another is the owner of personal property, but insisting that it is subject to a pledge to him for pre-existing debt, has the burden of proving the debt and pledge.—*Pulton v. Washington*, 476.

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CONSTITUTIONAL LAW.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW.

1. A statute making a tax deed conclusive evidence of the regularity of the tax proceedings is unconstitutional, as depriving the owner of property without due process of law.—*Bradford v. Durham*, 1.

CONSTITUTIONAL LAW—HAWKERS AND PEDDLERS—REGULATION—POLICE POWER—EQUALITY—CLASSIFICATION.

2. Laws 1905, p. 222, requiring itinerant venders of drugs, etc., to procure a license from the board of pharmacy, as amended by Laws 1907, p. 231, and prescribing a penalty for the sale of drugs by an itinerant vender without such license, was a proper exercise of police power, and was not in violation of Section 20, Article I, Constitution of Oregon, declaring that no law shall grant any class special privileges or immunities, in that it did not apply equally to all citizens in the State, since it applied equally to all itinerant venders of drugs, which was proper basis of legislative classification.—*State v. Miller*, 381.

CONSTITUTIONAL LAW—CLASS LEGISLATION—CLASSIFICATION.

3. The legislature, in passing laws regulating hawkers and peddlers, may divide them into different classes, provided the classification is reasonable and the regulatory provision applies equally to all engaged in the same class.—*State v. Miller*, 381.

CONSTITUTIONAL LAW—STATE CONSTITUTIONS—AS LIMITATION OF POWERS.

4. The legislative department of a state, unlike that department of the national government, may enact any law not expressly or impliedly prohibited by the constitution.—*Straw v. Harris*, 424.

CONSTITUTIONAL LAW—STATUTES—CONSTRUCTION.

5. All reasonable doubts must be resolved in favor of an act in determining whether it conflicts with the constitution.—*Straw v. Harris*, 424.

CONSTITUTIONAL LAW—INDEBTEDNESS—CONSTITUTIONAL LIMITATIONS.

6. Section 5, Article XI, Constitution of Oregon, provides that acts incorporating towns and cities shall restrict their powers of taxation, contracting debts, etc. Section 10 provides that no county shall create any debts or liabilities exceeding a certain sum. *Held* that, since the right given by the Constitution to form larger municipalities necessarily carries with it power to include those more limited in territory regardless of the proportionate increase in the indebtedness and taxation to follow that may necessarily accrue to the included towns by reason thereof, the limitation placed on the corporations enumerated applies only to each standing as a separate and distinct political division, and not to a larger municipality of which they may form an integral part; and hence act February 12, 1909 (Laws 1909, p. 73), providing for the incorporation under general laws of ports in counties bordering on bays or rivers navigable from the sea, is not unconstitutional as imposing on incorporated towns within the limits of a port indebtedness and taxes exceeding the limitations prescribed in such sections.—*Straw v. Harris*, 424.

CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWERS.

7. The State may not surrender its sovereignty to municipalities to the extent that it must be deemed to have perpetually lost control of them.—*Straw v. Harris*, 424.

CONSTITUTION OF OREGON.

Construed in This Volume. See Table in Front of This Volume.

CONSTITUTION OF THE UNITED STATES.

VI Amendment.—*State v. Osborne*, 289.

CONTINUANCE.**CONTINUANCE—ABSENCE OF WITNESSES**

1. The testimony of one of defendant's absent witnesses, for whom a continuance was asked, was taken by deposition, by consent of the State, and the affidavit stated that the other had left the State, and would not return under six weeks, but did not state the probable time of his return. Though the case was set for December 13, 1908, no subpoena was issued for the witness until on the 16th, leaving a delay unaccounted for of five or six days, nor did the application show the relevancy of the absent testimony to defendant's supposed defense. *Held*, that the denial of the application was not an abuse of discretion.—*State v. Finch*, 482.

CONTINUANCE—DENIAL—DISCRETION—AFFIDAVITS—BILL OF EXCEPTIONS.

2. Refusal of an application for a continuance will not be disturbed on appeal, except for abuse of discretion. Affidavits for continuance cannot be considered on appeal, unless made a part of the record by the bill of exceptions.—*State v. Finch*, 482.

CONTRACTS.**CONTRACTS—CONSTRUCTION—REPUGNANT CLAUSES.**

1. The rule that, where in a contract clauses are repugnant, the earlier provisions prevail, if the inconsistency be not so great as to avoid the instrument for uncertainty, is subject to the qualification that the contract must be construed to effect the intention of the parties as gathered from the entire instrument, and where there are repugnant clauses, they must be reconciled, if possible.—*Lachmund v. Lope Sing*, 106.

CONTRACTS—INTENTION OF PARTIES.

2. The intent, and not the words, is the essence of every agreement, if it can be ascertained therefrom.—*Lachmund v. Lope Sing*, 106.

CONTRACTS—CONSTRUCTION—REJECTION OF REPUGNANT CLAUSES.

3. The rule rejecting a repugnant clause of a contract in construing it is an expedient to which a court will not resort, unless absolutely compelled to do so.—*Lachmund v. Lope Sing*, 106.

CONTRACTS—CONSTRUCTION—SALES.

4. A contract for the sale and purchase of a crop of hops construed, and held that delivery of lower grade hops, resulting from conditions for which the seller was not responsible, was a compliance with the contract.—*Lachmund v. Lope Sing*, 106.

CONTRACTS—ABANDONMENT—SALES.

5. The act of a buyer of a crop of hops held to be an abandonment of the contract.—*Lachmund v. Lope Sing*, 106.

Agreements Not Within Statute of Frauds. See FRAUDS, STATUTES OF, 1, 5.

CONTRIBUTORY NEGLIGENCE.

CONTRIBUTORY NEGLIGENCE—WHEN QUESTION FOR JURY.

1. Contributory negligence will not in all cases be imputed, as a matter of law, to a person who receives an injury from a danger, simply from the fact that it might have been seen, because the nature of his duties or surrounding circumstances may be such as to distract his attention to other objects, and under such circumstances the question is for the jury.—*Gentzkow v. Portland Railway Co.* 114.

CONTRIBUTORY NEGLIGENCE—INJURY FROM ELECTRICITY—QUESTION FOR THE JURY.

2. Whether an employee of a telephone company coming in contact with an electrically charged iron peg in a telephone pole, in consequence of the negligence of an electric railway company, was guilty of contributory negligence, held for the jury.—*Gentzkow v. Portland Railway Co.* 114.

CONTRIBUTORY NEGLIGENCE—ELECTRICITY—INJURIES FROM PRODUCTION AND USE.

3. An employee of a telephone company may assume that a wire of an electric railway company, not intended to carry electricity and attached to a telephone pole under an agreement with a telephone company, is harmless.—*Gentzkow v. Portland Railway Co.* 114.

CONTRIBUTORY NEGLIGENCE—NONSUIT—QUESTION FOR JURY.

4. Where contributory negligence is urged, as a ground for nonsuit, or for a verdict for defendant, it must appear, after considering the evidence most favorably to plaintiff, that reasonable men would find, without any reasonable probability of differing in their views, either that plaintiff knew and appreciated the danger, or that ordinarily prudent men would acquire such knowledge and appreciation.—*Gentzkow v. Portland Railway Co.* 114.

CONTRIBUTORY NEGLIGENCE—EVIDENCE.

5. Where the evidence offered to establish negligence of defendant, resulting in injury to plaintiff, showed that plaintiff was guilty of negligence, without which the injury would not have occurred, plaintiff could not recover.—*Gentzkow v. Portland Railway Co.* 114.

CONTRIBUTORY NEGLIGENCE—ELECTRICITY—INJURY FROM.

6. One who knew, or who should have known, that wires supporting a trolley service wire were charged with a dangerous current of electricity, and who voluntarily exposed himself to the risk of being shocked thereby, was chargeable with contributory negligence precluding a recovery for the injuries received.—*Gentzkow v. Portland Railway Co.*, 114.

CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

7. The burden of proving contributory negligence is on defendant, and plaintiff need not show freedom from negligence.—*Gentzkow v. Portland Railway Co.*, 114.

CONTRIBUTORY NEGLIGENCE—INFANTS—CARE REQUIRED.

8. An infant is, as a general rule, only required to exercise that care in avoiding injury that the evidence shows him to be capable of.—*Russell v. Oregon R. & N. Co.* 128.

CONTRIBUTORY NEGLIGENCE—CARE EXERCISED BY INFANT TO AVOID INJURY IS QUESTION FOR JURY.

9. A boy 13 years old, bright and intelligent, does not, as a matter of law, possess the judgment and discretion of an adult, and the question of his exercising proper care in avoiding injury is for the jury.—*Russell v. Oregon R. & N. Co.* 128.

CONTRIBUTORY NEGLIGENCE—INJURY TO SERVANT.

10. That a servant suing for personal injuries is immature in years and inexperienced in the work, is important in determining the question of his contributory negligence.—*Ferrari v. Beaver Hill Coal Co.* 210.

CONTRIBUTORY NEGLIGENCE—INJURIES TO SERVANT.

11. Where a servant was injured by the alleged automatic starting of a machine as he was assisting in repairing the same, and he had no notice that it was liable to start automatically, he was not negligent as a matter of law in failing to take a safe position, and the question of assumed risk and contributory negligence were for the jury.—*Rogers v. Portland Lumber Co.* 386.

CONTRIBUTORY NEGLIGENCE—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE.

12. Evidence, in an action against a master for injuries to a servant, held sufficient to make the question of contributory negligence for the jury.—*Bigelow v. Columbia Gold Mining Co.* 482.

CORPORATIONS.

CORPORATIONS—VENUE—TRANSITORY ACTIONS.

1. Under Section 55, B. & C. Comp., relating to service of summons, a transitory action against a domestic corporation may be commenced, either in the county where it has its principal place of business, or in the county where the cause of action arose.—*Cunningham v. Klamath Lake R. Co.* 13.

CORPORATIONS—FOREIGN CORPORATIONS—ACTIONS—VENUE.

2. In the absence of any statute, a foreign corporation maintaining an agency in Oregon, and doing business therein, is deemed a resident thereof, and subject to the jurisdiction of its courts in matters growing out of contracts made in the State or causes of action arising therein, and service of process may be made in the same manner as in the case of a domestic corporation.—*Cunningham v. Klamath Lake R. Co.* 13.

CORPORATIONS—ACTIONS—VENUE.

3. At common law, a corporation may be sued only in the sovereignty creating it.—*Cunningham v. Klamath Lake R. Co.* 13.

CORPORATIONS—FOREIGN CORPORATIONS—RIGHT TO DO BUSINESS.

4. A state permitting a foreign corporation to do business within its limits may impose such conditions to the exercise of such authority as may seem reasonably necessary to safeguard the interests of its own citizens.—*Cunningham v. Klamath Lake R. Co.* 13.

CORPORATIONS—FOREIGN CORPORATIONS—VENUE—STATUTES.

5. Under Laws 1903, p. 39, requiring every foreign corporation doing business in the State to appoint a resident attorney in fact to accept service of process, etc., an action against a foreign corporation, for a personal injury negligently inflicted in another state, may be brought in the county in which the attorney resides.—*Cunningham v. Klamath Lake R. Co.* 13.

CORPORATIONS—AMENDING EXISTING STATUTES—VALIDITY.

6. Laws 1903, p. 39, requiring every foreign corporation doing business in the State to appoint a resident attorney to accept service of summons, etc., but containing no reference to Section 44, B. & C. Comp., relating to the place of trial, or to Section 55, prescribing the person on whom a summons may be served, or to Section 528, limiting the jurisdiction of a court over foreign corporations, amends the enumerated sections by implication only, and the changes in the existing laws made in that manner are not violative of any constitutional inhibition.—*Cunningham v. Klamath Lake R. Co.* 13.

CORPORATIONS—FOREIGN CORPORATIONS—ACTIONS—SERVICE OF PROCESS.

7. Where a foreign corporation, pursuant to the requirement of a statute, appoints an attorney in fact or other representative on whom process shall be served, the statutory method is generally exclusive, and service of summons on any other agent is ineffectual.—*Cunningham v. Klamath Lake R. Co.* 13.

CORPORATIONS—FOREIGN CORPORATIONS—ACTIONS—JURISDICTION.

8. The state into which the representatives of a foreign corporation are sent to transact lawful business therein, may by proper legislation make the corporation liable to its citizens in actions and suits, and the corporation may there be sued on any transitory cause of action, no matter where it arose.—*Cunningham v. Klamath Lake R. Co.* 13.

CORPORATIONS—RESIDENCE.

9. A corporation is deemed to be a resident of the state of its creation.—*Cunningham v. Klamath Lake R. Co.* 13.

CORPORATIONS—FOREIGN CORPORATIONS—PROCESS.

10. In the absence of any express legislation on the subject, Section 55, subd. 1, B. & C. Comp., relating to the service of summons in actions against private corporations, though intended to be applied to domestic corporations, applies to foreign corporations doing business in the State.—*Cunningham v. Klamath Lake R. Co.* 13.

CORPORATIONS—FOREIGN CORPORATIONS—JURISDICTION—STATUTE.

11. The requirement of Laws 1903, p. 39, that a statement giving the location of the principal office of a foreign corporation doing business in the State

shall be filed with the Secretary of State, is designed to afford evidence of its doing business in the State, and does not definitely fix the place where actions against it may be maintained.—*Cunningham v. Klamath Lake R. Co.* 13.

CORPORATIONS—FOREIGN CORPORATIONS—ACTION AGAINST—JURISDICTIONAL AVERMENT IN COMPLAINT.

12. The statement that a defendant foreign corporation is engaged in business in the State, necessary to secure jurisdiction of its person, may appear anywhere in the record, and hence an averment of that fact in the complaint is not indispensable.—*Multnomah Lumber Co. v. Weston Basket Co.* 22.

CORPORATIONS—FOREIGN CORPORATIONS—ACTION AGAINST—JURISDICTION TO SUPPORT JUDGMENT.

13. In absence of a voluntary appearance, no foreign corporation is subject to the jurisdiction of the State courts, unless it is engaged in the State in transacting some part of its corporate business when sued, which fact should appear somewhere in the record, to support a judgment rendered against it for failure to appear or answer after service of process on a resident agent.—*Multnomah Lumber Co. v. Weston Basket Co.* 22.

CORPORATIONS—ACTION AGAINST FOREIGN CORPORATION—JURISDICTION—HOW ACQUIRED—APPEARANCE BY ATTORNEY.

14. Jurisdiction to render a judgment against a foreign corporation for failure to appear and answer may rest on its voluntary appearance by its duly appointed attorneys, which is equivalent to personal service of the summons as expressly provided by Section 63, B. & C. Comp.—*Multnomah Lumber Co. v. Weston Basket Co.* 22.

COSTS.

COSTS—ON APPEAL—UNNECESSARY MATTER.

1. Under Supreme Court rule 9, 50 Or. 574 (91 Pac. IX), requiring the abstract of the record to contain so much of the complaint, etc., involved in the appeal, as may be necessary to explain the questions raised, costs will not be allowed for the printing of pleadings having no bearing on the issues on appeal and unnecessarily included in the abstract.—*Litherland v. Cohn Real Estate Co.* 71.

COSTS—ON APPEAL—TRANSCRIPT OF EVIDENCE—CARBON COPY.

2. Under Supreme Court rule 8, 50 Or. 573 (91 Pac. IX), providing that "in equity cases the brief shall contain such portion of the evidence as may be deemed material" in either narrative form or by question or answer, "the expense of a carbon copy of the transcript of evidence on appeal is not a proper disbursement.—*Litherland v. Cohn Real Estate Co.* 71.

COSTS ON APPEAL—EXPENSES OF TRANSCRIBING TESTIMONY.

3. The costs of transcribing the stenographer's notes of the testimony must be taxed in the lower court, as required by Section 906, B. & C. Comp., and are not taxable as part of the disbursements on appeal.—*McGee v. Beckley*, 250.

COSTS—DISBURSEMENTS—LIABILITY ON INJUNCTION BOND.

4. Under Section 418, B. & C. Comp., defendant held entitled to recover the costs and disbursements awarded when the injunction against him was dismissed.—*Officer v. Morrison*, 549.

COSTS—DEPENDENT ON STATUTE—SPECIAL PROCEEDINGS.

5. Where a special proceeding for the condemnation of land for public purposes is provided by statute, and no provision is made for recovery of costs, none can be awarded; but, where the question of damages has been tried out as in an ordinary action at law, the general laws on the subject of the costs will prevail, so that where in such case the decision of the circuit court has been affirmed on appeal, respondent is entitled to costs.—*In re Sage*. *Foran v. Sage*, 597.

COUNTY ROADS.

Same as HIGHWAYS.

COURTS.

COURTS—CRIMINAL LAW—TRIAL—ACQUITTAL.

Under Section 953, B. C. Comp., where, pending trial of accused, the Governor proclaimed certain holidays, but no court was held during three days, on which no holidays were proclaimed, the jury was thereby discharged for the term, which amounted to an acquittal.—*State v. Turpin*, 367.

CRIMINAL LAW.

CRIMINAL LAW—INDICTMENT AND INFORMATION—SUFFICIENCY.

1. Under Section 1808, B. & C. Comp., an indictment for larceny, held sufficient to charge simple larceny.—*State v. Minnick*, 88.

CRIMINAL LAW—INDICTMENT AND INFORMATION—GRAND OR SIMPLE LARCENY.

2. Under Section 1801, B. & C. Comp., relating to grand larceny, an indictment held not sufficient to charge grand larceny.—*State v. Minnick*, 88.

CRIMINAL LAW—TRIAL—INSTRUCTIONS—WEIGHT OF EVIDENCE.

8. In a larceny prosecution, an instruction that if, shortly after the theft, the property was found in the possession of defendant, and defendant has failed to explain how he obtained such possession, his failure to make such explanation may be considered as a circumstance tending to show defendant's guilt, and given such weight as seemed proper in connection with the other evidence in the case, is not erroneous as assuming a theft or as assuming that defendant's explanation was unreasonable.—*State v. Minnick*, 88.

CRIMINAL LAW—TRIAL—INSTRUCTIONS—REQUESTS.

4. Requested instructions covered by the general charge are properly refused.—*State v. Minnick*, 88.

CRIMINAL LAW—TRIAL—REBUTTAL EVIDENCE—ADMISSIBILITY.

5. In a larceny prosecution in which a foundation is laid for the admission of impeaching evidence by asking defendant the truth of certain admissions which he was alleged to have made, which he denied, a witness may not testify on rebuttal as to the making of such admissions, unless the evidence is limited to the purpose of impeachment, where the admissions are prejudicial to defendant and part of the state's case.—*State v. Minnick*, 88.

CRIMINAL LAW—EXCLUSION OF PUBLIC FROM TRIAL—PRESUMPTIONS AS TO ENFORCEMENT OF ORDER AND PREJUDICE FROM ERROR.

6. In the absence of a showing to the contrary, it is presumed that an order excluding the public from the courtroom during a criminal trial was enforced, and that it was prejudicial to the rights of the defendant.—*State v. Osborne*, 289.

CRIMINAL LAW—TRIAL—EXCLUSION OF PUBLIC.

7. Under Section 11, Article I, Constitution of Oregon, declaring that, "in all criminal prosecutions the accused shall have the right to public trial," it was error for the court, in a prosecution for assault with intent to rape, to exclude from the courtroom all persons, except defendant, the attorneys engaged in the trial, the jury and officers of the court, and the witnesses while on the stand.—*State v. Osborne*, 289.

CRIMINAL LAW—TRIAL—STRIKING OUT OF EVIDENCE.

8. Hearsay evidence should be stricken out, though it was elicited on cross-examination by the parties objecting thereto.—*State v. Osborne*, 289.

CRIMINAL LAW—EVIDENCE—ACTS OF CODEFENDANT.

9. In a prosecution for an assault with intent to rape, the admission of evidence of a previous similar assault on the daughter of the prosecuting witness by a codefendant not on trial is reversible error.—*State v. Osborne*, 289.

CRIMINAL LAW—REVIEW OF APPEAL—HARMLESS ERROR.

10. A conviction will not be reversed for the giving of hearsay evidence which was not responsive to the questions asked, where the court instructed the jury not to consider it, and no prejudice therefrom appears.—*State v. Osborne*, 289.

CRIMINAL LAW—PRESUMPTION OF GUILT FROM FLIGHT.

11. The presumption of guilt arising from the flight of accused is one of fact, and not of law; and the question as to whether the circumstance tends to show a guilty intent is for the jury.—*State v. Osborne*, 289.

CRIMINAL LAW—FLIGHT AS EVIDENCE OF GUILT.

12. The flight of accused may be taken into consideration by the jury as a circumstance in connection with the other evidence in determining whether accused was guilty of the crime charged.—*State v. Osborne*, 289.

CRIMINAL LAW—GROUNDS FOR NEW TRIAL.

18. After conviction of defendants on the charge of robbery and assault with intent to kill, if resisted, one of the defendants filed an affidavit in

support of a motion for a new trial that since the trial affiant has learned that F. took from the prosecuting witness the money specified in the indictment, and that affiant had been informed that, if a new trial was granted, F. would make a full confession completely exonerating affiant from any participation in the crime. A third person was charged in the indictment as "John Doe" with having participated in the crime, and there was nothing to show that F. was not "John Doe." An affidavit by the other defendant was filed stating that he saw F. take the money from the prosecuting witness, but that he did not tell any person thereof until after the trial. There was also evidence that on the day of the robbery, F. had money in his possession similar to that taken from the prosecuting witness. *Held*, that the showing was not sufficient to warrant a new trial.—*State v. Parr*, 318.

CRIMINAL LAW—APPEAL—REVIEW OF INSTRUCTIONS—RECORD.

14. Where the evidence is not in the record, the court must assume that instructions correctly stating the law were justified by the evidence possible under the pleadings; but, where no possible state of the evidence justified the instructions, the giving of them was error.—*State v. Jancigay*, 361.

CRIMINAL LAW—INSTRUCTIONS—CONSTRUCTION AS A WHOLE—"DELIBERATE"—PRESUMPTIONS AS TO MALICE.

15. Under Section 737, B. & O. Comp., providing that an intent to murder arises from the deliberate use of a deadly weapon, causing death, etc., and Section 1754, relating to the evidence of malice and premeditation in murder in the first degree, an instruction that the law conclusively presumes malice "from the deliberate and unlawful use of a deadly weapon," but does not conclusively presume that the killing is murder in any degree, followed by a charge that to constitute murder in the first degree there must be some other evidence than the mere fact of killing, sufficiently protects the rights of accused, relying on the defense of insanity, for the word "deliberate" means to weigh the motives for an act, its consequences, the nature of the crime, or the things connected with the intention, with a view to a decision thereon, and implies that accused was capable of the exercise of mental powers.—*State v. Jancigay*, 361.

CRIMINAL LAW—TERMINATION OF TRIAL—DISCHARGE OF DUTY—ACQUITTAL.

16. Section 953, B. & O. Comp., provides that, if no judge attends on the day appointed for holding a court before 4 o'clock in the afternoon, the court shall stand adjourned until the next day at 9 o'clock, and if no judge attend on that day before 4 o'clock in the afternoon, it shall then stand adjourned for the term. Defendant's trial was commenced on October 28, 1907, the jury impaneled and testimony taken, but the next day, while counsel were proceeding with their argument, information was received that the Governor had proclaimed that day a legal holiday, whereupon the jury were allowed to separate until the next judicial day. A succession of holiday proclamations followed each day until the 5th of December, when an interval of three days ensued, during which no holidays were proclaimed. On December 8th holidays were again proclaimed, and continued until December 14th. *Held* that, no court having convened during the three days' interval between the holidays declared, the court stood adjourned for the term, which operated as an acquittal, under the rule that a discharge of the jury without legal necessity therefor, before verdict, amounts to an acquittal.—*State v. Turpin*, 367.

CRIMINAL LAW—INSTRUCTIONS—THREATS.

17. Defendants' requested instruction, that evidence of threats against decedent's family could not be considered as against one of the defendants not shown to have had any knowledge thereof, was properly refused, where it further stated that, if the jury were satisfied from the evidence as to which party commenced the affray, they could not consider the evidence of threats as against either defendant; the court not being authorized to charge that, if one item of relevant evidence satisfies the jury's mind on a given point, another item on the same point may be rejected.—*State v. Walsworth*, 371.

CRIMINAL LAW—PAROL EVIDENCE.

18. Where a receipt given for money pursuant to alleged fraudulent representations contained the letters "S. B. Lumbr. Co." to designate the name of a business concern to which prosecutor was referred for employment, parol evidence was admissible to explain the meaning of such letters and abbreviations.—*State v. German*, 385.

CRIMINAL LAW—OTHER OFFENSES—MOTIVE—INTENT.

19. In a prosecution for false pretenses, testimony concerning similar offenses was admissible to show motive and fraudulent intent.—*State v. German*, 385.

CRIMINAL LAW—EVIDENCE—REBUTTAL.

20. Where, in a prosecution for false pretenses, the State introduced evidence of other similar offenses to show motive and fraudulent intent, the court properly permitted defendant to explain the transactions proved by the State, but refused to allow defendant to prove additional instances not otherwise referred to, in which he had returned money received from employees for whom he had failed to procure employment.—*State v. Germann*, 395.

CRIMINAL LAW—REVIEW—RECORD—ADMISSION OF EVIDENCE.

21. In the absence of a bill of exceptions, alleged error in the admission of evidence is unavailing on review.—*State v. Martin*, 403.

CRIMINAL LAW—APPEAL—OBJECTIONS TO INDICTMENT—WAIVER.

22. Under Section 1865, B. & O. Comp., providing "that the objection to the jurisdiction of the court over the subject-matter of the indictment, or that the facts stated do not constitute a crime, may be taken in the trial under a plea of not guilty, or in arrest of judgment," the objection that the facts stated in an indictment do not constitute a crime may be raised first in the appellate court, and is not waived by failing to demur or move to arrest of judgment in the trial court.—*State v. Martin*, 403.

CRIMINAL LAW—REVIEW—ASSIGNMENT OF ERRORS.

23. The error relied on in the review of a criminal prosecution should be clearly assigned, so that the district attorney has notice thereof.—*State v. Martin*, 403.

CRIMINAL LAW—REVIEW—ASSIGNMENT OF ERRORS.

24. The objections that the facts stated in an indictment do not constitute a crime, or that the trial court does not have jurisdiction of the offense, may be raised in the appellate court, though not assigned as errors.—*State v. Martin*, 403.

CRIMINAL LAW—APPEAL—REVIEW—SCOPE—BILL OF EXCEPTIONS.

25. Where, on appeal from a conviction, there is no bill of exceptions, the sufficiency of the information is the only subject for review.—*State v. Martin*, 403.

CRIMINAL LAW—LARCENY—ACCOMPLICES.

26. In view of the statute by its terms making larceny and the receiving of stolen goods distinct offenses, where defendant had nothing to do with the unlawful taking of a horse, his subsequent purchase of the animal did not make him an accomplice, even if he had knowledge of the previous theft.—*State v. Mozley*, 406.

CRIMINAL LAW—TRIAL—TIME TO PREPARE.

27. Where a coroner's inquest was held shortly after the killing, at which accused's principal counsel was present, and several counsel, who represented accused on his final trial, were present at the preliminary examination, which was held a week after the killing, the court did not err in compelling accused to go to trial within eight days after the finding of the indictment, on the theory that his counsel had had insufficient time to prepare, though they had not been formally retained until after the indictment was found.—*State v. Finch*, 482.

CRIMINAL LAW—CONTINUANCE—ABSENCE OF WITNESSES.

28. The testimony of one of defendant's absent witnesses, for whom a continuance was asked, was taken by deposition, by consent of the State, and the affidavit stated that the other had left the State, and would not return under six weeks, but did not state the probable time of his return. Though the case was set for December 18, 1906, no subpoena was issued for the witness until on the 16th, leaving a delay unaccounted for of five or six days, nor did the application show the relevancy of the absent testimony to defendant's supposed defense. *Held*, that the denial of the application was not an abuse of discretion.—*State v. Finch*, 482.

CRIMINAL LAW—CONTINUANCE—DENIAL—DISCRETION—AFFIDAVITS—BILL OF EXCEPTIONS.

29. Refusal of an application for a continuance will not be disturbed on appeal, except for abuse of discretion. Affidavits for continuance cannot be considered on appeal, unless made a part of the record by the bill of exceptions.—*State v. Finch*, 482.

CRIMINAL LAW—EVIDENCE—OTHER OFFENSES—MOTIVE.

30. Where the defendant's act in killing deceased arose from the persistence of deceased's prosecution of defendant, resulting in his suspension from

practice as an attorney, the record showing the charges preferred by deceased as prosecutor for the State Bar Association against defendant, accusing him of drunkenness while trying a case in court, the issuance of checks on a bank where he had no funds, and of unlawfully affixing a notarial seal to certain pension papers, etc., was competent as evidence of motive, though it showed defendant was guilty of other offenses.—*State v. Finch*, 482.

CRIMINAL LAW—APPEAL—RIGHT TO ALLEGE ERROR.

81. Accused was not entitled to claim that the introduction of the record of his prosecution by deceased, for conduct unbecoming an attorney, which was the cause of the killing, was error, where he himself introduced the record of the preliminary hearing of the same charges before the grievance committee of the Bar Association, which was substantially the same as the record introduced by the State.—*State v. Finch*, 482.

CRIMINAL LAW—EVIDENCE—LOCUS IN QUO—PLAT.

82. In a prosecution for homicide, a plat of decedent's office, drawn to a scale by an expert, and shown by his testimony to be a generally fair and accurate representation of the *locus in quo* shortly after the homicide, was admissible, not as substantive evidence, but to aid in understanding the testimony.—*State v. Finch*, 482.

CRIMINAL LAW—EVIDENCE—PHOTOGRAPH OF DECEASED.

83. Where the physician who performed the autopsy was not personally acquainted with deceased, the court properly permitted a photograph, proven to be a correct likeness of deceased, taken in health, to be introduced to identify the body of the person on whom the autopsy was performed as that of deceased.—*State v. Finch*, 482.

CRIMINAL LAW—PAROL EVIDENCE.

84. Where defendant killed deceased because of the latter's zeal in prosecuting charges against defendant for disbarment, and it did not appear that deceased's appointment as prosecutor for the Bar Association was other than oral, or that it had records of any kind, the fact that deceased was prosecutor for the association was provable by parol.—*State v. Finch*, 482.

CRIMINAL LAW—STATEMENTS OF COUNSEL.

85. That special counsel for the State, in the course of an argument to the court, said that defendant "shot Fisher down" was not error; the court having promptly directed the jury to disregard the language.—*State v. Finch*, 482.

CRIMINAL LAW—APPEAL—HARMLESS ERROR.

86. Section 856, B. & O. Comp., provides that the judge himself, or any juror, may be called as a witness by either party, but in the former case it is within the discretion of the court or judge to order the trial to be postponed or suspended, and to take place before another judge. Held that, where in a prosecution for homicide a juror was called from the box, and the judge from the bench, by defendant to testify concerning trifling and inconsequential matters, the fact that the judge did not suspend the trial and direct it to be continued before another judge, while he was testifying, and that only eleven jurors were in the box while the juror was testifying, was immaterial.—*State v. Finch*, 482.

CRIMINAL LAW—INSTRUCTIONS—POLLING JURY.

87. Where the bill of exceptions showed that all the jurors were present at the convening of court, and trial was not at any time allowed to proceed without all the jurors, the defendant and his counsel being present, and that all the jury were present when the instructions were given, an objection that the jury was not polled before the court gave its instructions was frivolous.—*State v. Finch*, 482.

CRIMINAL LAW—RIGHT TO COMPETENT COUNSEL.

88. Where defendant himself was a lawyer of several years' standing, and his partner had been a practicing attorney of the Supreme Court for a number of years, and in addition he had the services of a former district attorney and two other lawyers, who both exhibited knowledge of law and experience in criminal trials, an objection that he was not represented by competent counsel was unsustainable.—*State v. Finch*, 482.

CRIMINAL LAW—EVIDENCE—OTHER OFFENSES.

89. While proof of other offenses having no connection with that charged, is ordinarily inadmissible, the State, to establish intent or motive, may show other crimes committed by accused which are connected with the offense charged.—*State v. Hembree*, 483.

CRIMINAL LAW—ELEMENTS OF CRIME—MOTIVE.

40. The existence of a motive for the commission of a crime is not indispensable to conviction, though such proof is of great importance in cases depending on circumstantial evidence.—*State v. Hembree*, 463.

CRIMINAL LAW—EVIDENCE—INFERENCES—INFERENCE ON INFERENCE.

41. Under Section 788, B. & O. Comp., defining inference as a deduction which the reason of the jury makes from the facts proved without any express direction of law, and Section 786, requiring an inference to be founded on a fact legally proved, or on such a deduction from that fact as is warranted by the usual propensities or passions of men, etc., an inference cannot be predicated upon an inference, so that where accused's sexual intercourse with his daughter was not legally proved as a fact, it would not support an inference of motive for the killing of his daughter and wife.—*State v. Hembree*, 463.

CRIMINAL LAW—EVIDENCE.

42. The presence of semen on a bed sheet cannot be held to be shown by evidence of the existence of a whitish liquid on, or a starchy condition of, the sheet, but the existence of spermatozoa should have been established therein.—*State v. Hembree*, 463.

CRIMINAL LAW—EVIDENCE.

43. The relationship of father and daughter excludes any presumption of sexual relations between them merely from their intimate association, and a much greater degree of proof would be necessary to justify a criminal inference than if such relationship had not existed.—*State v. Hembree*, 463.

CRIMINAL LAW—INSTRUCTIONS—OBLIGATION OF JURY.

44. Under Section 16, Article I, Constitution of Oregon, providing that in criminal cases the jury shall determine the law and the facts under the direction of the court as to the law, the jury have not the moral right to disregard the directions of the court as to the law, and in determining the guilt or innocence of accused they should, as required by Section 1410, B. & O. Comp., receive the law from the court, though they have the power to disregard the instructions and acquit accused, who cannot, because of Section 12, be again placed in jeopardy for the same offense.—*State v. Daley*, 514.

CRIMINAL LAW—TRIAL—INSTRUCTIONS—PUNISHMENT.

45. The court, in charging that the jury in finding accused not guilty on the ground of insanity should state that fact in the verdict, properly refused to charge, in the language of Section 1424, B. & O. Comp., that the court on such a verdict must commit accused to a lunatic asylum, where it deems his being at large dangerous to the public safety; whether accused should be so confined being for the court alone.—*State v. Daley*, 514.

CRIMINAL LAW—TRIAL—INSTRUCTIONS—PUNISHMENT.

46. Where the jury are not authorized by statute to prescribe the punishment, it is not error to refuse to instruct what the penalty may be if accused is found guilty as charged or of a lesser offense included in the indictment.—*State v. Daley*, 514.

CRIMINAL LAW—APPEAL—EXCEPTIONS BELOW.

47. Any error of the court in failing in its duty, under Section 16, Article I, Constitution of Oregon, to instruct, without request, on all questions of law arising in the case, is unavailable on appeal, unless exception was reserved.—*State v. Daley*, 514.

CRIMINAL LAW—EVIDENCE—OTHER OFFENSES.

48. Defendant was charged with having killed deceased, the proprietor of a secondhand store, by striking him with a gas pipe wrapped in newspaper, as deceased turned to show defendant an article for which he had inquired. Sixteen hours before another secondhand dealer had been struck on the head with a rusty iron bar wrapped in newspaper in the same manner, and twenty-four hours after the attack on deceased, defendant entered a Chinese tailor shop with a rusty piece of gas pipe wrapped in a newspaper and handkerchief, and requested to be shown an article of merchandise from one of the shelves. The Chinaman saw the pipe, and, on inquiry, defendant stated he was working for the gas company. As the Chinaman turned to get the article, defendant struck him with the pipe, but the blow failed to stun him, and he pursued defendant, who, when arrested, stated that he thought he had killed the Chinaman, having knocked over a number of his kind, and did not think the Chinaman would be able to identify him. On it becoming known that some one had killed deceased, who was a Jew, defendant stated, "They ought to kill all the God-damned Jews." Held, that evidence of the assault committed on the Chinaman and on the storekeeper preceding the assault on deceased was admissible in a prosecution for killing deceased.—*State v. La Rose*, 555.

CRIMINAL LAW—WITNESSES—INDORSEMENT—IDENTITY.

49. The object of placing the names of witnesses on the indictment being only to identify the person who testified before the grand jury, the description of a witness whose true name was "Thomas Kinney" as "Thomas Leonard" was not objectionable where it appeared that the witness was a member of an acrobatic trio, known as the "Leonor Bros. Trio," that he was also known as "Thomas Leonard," and that he was employed in a saloon known as "Leonor Bros. Saloon."—*State v. La Rose*, 555.

As to Indictment, Assault With Intent to Rob, Burden of Proof, Etc. See ROBBERY.

DAMAGES.

DAMAGES—OBSTRUCTION OF NAVIGABLE WATERS—INFUNCTION.

1. Obstructions to navigation, unless legally authorized, are a nuisance, for the maintenance of which the person causing it is liable in damages to one specially injured thereby, or which he may enjoin or have abated.—*Oliver v. Klamath Lake Navigation Co.* 95.

DAMAGES—PERSONAL INJURY—EVIDENCE—ADMISSIBILITY.

2. In an action by an infant for personal injury, his testimony as to the length of time he was able to work after the injury, and prior to the trial, was competent to show the extent of the injury and the probable effect it might have on his future earning capacity, though no damages could be assessed for loss of time during his minority.—*Ferrari v. Beaver Hill Coal Co.* 210.

DEDICATION.

DEDICATION—EVIDENCE—SUFFICIENCY.

1. In a suit to enjoin the closing of an alleged street which plaintiffs claimed that defendants represented, upon selling lots to them, would remain open as a street, evidence held to show that plaintiffs purchased the land with the understanding that the tract would be open as a street.—*Morse v. Whitcomb*, 412.

DEDICATION—EVIDENCE—ADMISSIBILITY.

2. In an action to restrain the closing of a tract which plaintiffs claim defendants represented, upon selling lots to them, would be open as a street, a map showing various streets platted in lots of uniform size, with a number of smaller lots along the strip which plaintiffs claim was intended to be reserved as a street, was admissible to corroborate plaintiffs' testimony as to defendants' statement that that tract would be opened as a street.—*Morse v. Whitcomb*, 412.

DEDICATION—EVIDENCE—ADMISSIBILITY.

3. A parcel dedication accompanied by user may be shown by the acts of the owner such as selling lots on opposite sides of a strip suitable for a street and acquiescing in its use by the public for a long period of time.—*Morse v. Whitcomb*, 412.

DEDICATION—PUBLIC STREET—EVIDENCE—ESTOPPEL.

4. Evidence examined and held sufficient to establish the fact that defendants dedicated, as a public street, the strip of land in controversy, and should be enjoined from in any manner obstructing it.—*Morse v. Whitcomb*, 410.

DEEDS.

DEEDS—UNAUTHORIZED DELIVERY OF DEED IN ESCROW.

1. A deed left in escrow, which is improperly delivered by the depository without compliance with a condition requiring payment of the consideration named, passes no title.—*Bradford v. Durham*, 1.

DEEDS—TAX DEEDS—RECITALS—SUBSTANTIAL COMPLIANCE.

2. A tax deed based on an assessment to "Priscilla Durham," which recites that the land was assessed to "Petruella Durham," is not a "substantial" statement of the assessment within the requirements of Section 8127, B. & O. Comp., defining the effect of tax deeds as evidence.—*Bradford v. Durham*, 1.

DEEDS—MENTAL CAPACITY—EVIDENCE.

3. Evidence, in a suit to set aside a deed, held to show that, though the grantor was old, with the natural enfeeblement of physical and mental pow-

ers, she retained an unimpaired judgment and an active memory rendering her competent to make a valid contract.—*Ames v. Moore*, 274.

DEEDS—VALIDITY—UNDERSTANDING OF GRANTOR.

4. Evidence, in a suit to set aside a deed, held to show that the grantor understood the nature and effect of her act and intended to execute an absolute deed.—*Ames v. Moore*, 274.

DEEDS—VALIDITY—MISTAKE.

5. There having been no mutual mistake in the execution of a deed and a contract by the grantee to take care of the grantor in consideration of the deed, the grantee's belief that the legal effect of the instruments was to give him only a lease for the life of the grantor is no ground for setting aside the deed or limiting it to such effect.—*Ames v. Moore*, 274.

DEEDS—CONSIDERATION.

6. The contract of a son to take care of his mother for life for a conveyance of land is sufficient consideration for the deed.—*Ames v. Moore*, 274.

DEEDS—CONSIDERATION—PERFORMANCE.

7. The consideration of a deed from mother to son of her farm, his contract to immediately commence settling his business where he was living, and as soon as convenient to move to the farm and cultivate it, to maintain for her exclusive use, commencing the following July, a room on the premises, and to furnish her support, was fully performed, though the grantor died two days after the grantee's arrival and before the time for maintenance of the room.—*Ames v. Moore*, 274.

DEEDS—DELIVERY.

8. Delivery to the grantee of a deed, the consideration of which is his contract to take care of the grantor for life, passes the title.—*Ames v. Moore*, 274.

DEEDS—VALIDITY—FRAUDS AND MISREPRESENTATIONS—EVIDENCE.

9. Evidence, in a suit to set aside a deed, held to show no fraud or undue influence practiced by the grantee on the grantor.—*Ames v. Moore*, 274.

DEFINITIONS.

See WORDS AND PHRASES.

DISBURSEMENTS.

Same as COSTS.

DISCRETION OF COURT.

DISCRETION OF COURT—DEFAULT JUDGMENT—OPENING DEFAULT.

1. The granting or refusing the motion to open a default is a matter resting in the sound discretion of the court, and its exercise will not be disturbed, except for abuse of that discretion.—*Anderson v. McClellan*, 208.

DISCRETION OF COURT—REQUEST FOR INSTRUCTIONS—INCLUDED IN GENERAL CHARGE.

2. A court is not bound to give, and ought not to give, an instruction, even though it may state the law correctly, which is not couched in language sufficiently untechnical to be comprehended by the average juror, for by so doing the jury is confused rather than instructed.—*State v. Osborne*, 289.

DISTRICT AND PROSECUTING ATTORNEYS.

DISTRICT AND PROSECUTING ATTORNEYS—DUTIES OF PROSECUTING ATTORNEY.

1. It is as much the duty of prosecuting attorneys to see that a person on trial is not deprived of any of his constitutional or statutory rights as it is to prosecute him for the crime with which he is charged.—*State v. Osborne*, 289.

DIVORCE.

DIVORCE—PROPERTY RIGHTS—DETERMINATION—ACQUIESCENCE.

1. Where the parties to a divorce proceeding made no objection to the determination of their property rights in the property in controversy, they impliedly consented to such determination concerning real estate mentioned in the pleadings in the action, and the husband, having been directed to convey certain of such real estate to his wife, acquiesced in the decree by executing a deed to her in accordance therewith.—*Taylor v. Taylor*, 500.

DIVORCE—PROPERTY RIGHTS—DETERMINATION.

2. The individual property of a married woman, not growing out of the marriage relation, or the proceeds thereof, is not a proper subject for adjudication in an action by her for divorce, as against a timely objection.—*Taylor v. Taylor*, 560.

DIVORCE—PROPERTY RIGHTS—"PROPERTY GROWING OUT OF MARRIAGE RELATION."

3. The expression "property growing out of marriage relation," which a court in a divorce proceeding is authorized to distribute, has reference only to that class of property, the interest in which of either husband or wife attaches by operation of law, as dower, curtesy, tenancy by the entirety, or in case of divorce, provision for division of which is made in Section 511, B. & C. Comp., and does not apply to property belonging to the wife.—*Taylor v. Taylor*, 560.

DIVORCE—ACTION BY DIVORCED WIFE AGAINST HUSBAND—STATUTES.

4. Under Sections 5244, 5249, B. & C. Comp., extending to a wife, as well as to the husband, such rights of action with reference to each other as exists with reference to other parties, a *feme sole*, after divorce was authorized to sue her former husband in assumpsit to recover rents collected by him from her separate property, for which he had failed to account.—*Taylor v. Taylor*, 560.

DIVORCE—CONCLUSIVENESS OF DECREE—PROPERTY RIGHTS.

5. Where, in a divorce proceeding, the decree, in addition to granting a divorce, granted plaintiff a money allowance in specific real property with the intent that such allowance should amount to a division of property accumulated by their joint effort during coverture and the settlement of all rights growing out of the use of the property, and after final adjudication by the Supreme Court both parties acquiesced therein and accepted the benefits of the decree, it was conclusive against the wife's right to recover rents collected from the property which the husband conveyed to her, which accrued prior to such conveyance.—*Taylor v. Taylor*, 560.

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW.

EASEMENTS.

EASEMENTS—DEFINITIONS.

1. An "easement" is a right in one person to do certain acts on another's land, or to compel such other to refrain from doing certain acts thereon. In strictness the term does not include the authority of a landowner to use a way from her residence over land the legal title to which she retained for her own purposes.—*German Savings & Loan Society v. Gordon*, 147.

EASEMENTS—SERVITUDE—"QUASI EASEMENT."

2. The owner of an entire tract of land or of two or more adjoining parcels may so employ a part thereof as to create a seeming servitude in favor of another portion to which the use becomes appurtenant. Such use is tantamount to an easement at will, so long as the unity of ownership continues, and is described as a "quasi easement."—*German Savings & Loan Society v. Gordon*, 147.

EASEMENTS—QUASI EASEMENT—QUASI-DOMINANT TENEMENT—CONVEYANCE—EFFECT.

3. Where an owner of land creates a quasi easement in one portion of her land in favor of another portion, and conveys the quasi-dominant tenement without an express reference in the deed to the servitude, whether the easement passed by implied grant depends on the nature and character of the use imposed, as indicating whether the grantor intended to convey a right to use the quasi tenement, and the grantee reasonably expected to take and hold such right.—*German Savings & Loan Society v. Gordon*, 147.

EASEMENTS—QUASI EASEMENT—CONVEYANCE—IMPLIED GRANT—CONTINUOUS AND APPARENT QUASI EASEMENT.

4. The grantee of a quasi-dominant tenement takes an apparent quasi easement by implied grant, provided the easement is one of reasonable necessity to the enjoyment of the property conveyed.—*German Savings & Loan Society v. Gordon*, 147.

EASEMENTS—DISCONTINUOUS QUASI EASEMENT—IMPLIED GRANT.

5. A discontinuous quasi easement, when evidenced in a substantial manner, passes by implied grant as an appurtenant to the dominant tene-

ment, when the latter is severed by a conveyance thereof.—*German Savings & Loan Society v. Gordon*, 147.

EASEMENTS—QUASI EASEMENTS—IMPLIED GRANT—CONVEYANCE OF DOMINANT ESTATE—SEVERANCE.

6. G., while the owner of four lots in a city block numbered 1, 2, 7, and 8, lots 1 and 2 facing on H. street and 7 and 8 in the rear facing on C. street, sold lot 7, reserving a passageway 5.125 feet wide, extending from C. street to the rear of lot 2, on which her house was partially located. G. built a picket fence on the south line of lot 8, just north of the passageway. The entrance to the passageway was originally indicated by a gate, and was reached by three ascending steps from the street grade and covered by a two-board walk, which extended eastward across the lot past the house of the purchaser of lot 7, who built a fence from the northwest corner of his house along his boundary to C. street, so that the passage was inclosed to the rear of his house, and from there on was not fenced. The gate, when closed, completed the angle and connected the south line of G.'s fence with the west line of the fence of the owner of lot 7. G. mortgaged lots 1 and 2 without reference to the right of way, which mortgage was thereafter foreclosed. *Held*, that the purchaser at the foreclosure sale acquired the right to use the passageway as a quasi easement appurtenant to lot 2.—*German Savings & Loan Society v. Gordon*, 147.

EASEMENTS—HIGHWAYS—OBSTRUCTIONS.

7. Where a party seeks to restrain an obstruction of a highway or easement, the injured party is not limited or confined to that part of the roadway or easement abutting upon or in front of his premises.—*Morse v. Whitcomb*, 412.

Public Easements. See DEDICATION; HIGHWAYS.

EJECTMENT.

EJECTMENT—IDENTITY OF LAND—EVIDENCE.

1. Evidence held insufficient to identify an alleged strip of land between the true boundaries of two tracts according to government surveys.—*Seabrook v. Coos Bay Ice Co.* 172.

EJECTMENT—TRIAL—NONSUIT.

2. A motion for nonsuit in ejectment, on the ground that the evidence shows title only to tide lands, while the complaint describes land only below low tide, is properly denied, where the answer admits the premises are above low tide.—*Seabrook v. Coos Bay Ice Co.* 172.

ELECTION OF REMEDIES.

ELECTION OF REMEDIES—EFFECT—REMEDIES BARRED.

The fact that an assignee of a part of a judgment commenced an attachment against the judgment creditor to attach the sum paid by the judgment debtor in consideration of a settlement of the judgment, pursuant to an agreement between the judgment creditor and judgment debtor, does not estop the assignee from instituting a suit to enforce his rights against real estate made subject to the payment of the judgment; the judgment debtor not having been misled or caused to act to his injury.—*Alexander v. Munroe*, 500.

ELECTIONS.

ELECTIONS—WHAT CONSTITUTES A MAJORITY.

In a city having three hundred and thirty legal voters, who were qualified to vote upon the question of the adoption of a new charter, but one hundred and sixty-two votes were cast, ninety-two for and seventy against the proposed charter. *Held*, that only a majority of those voting is all that is required to adopt the new charter, and when the statute is silent, it will be presumed that the electors who do not vote are in favor of the measure.—*Haines v. City of Forest Grove*, 448.

Holding of Election Under Local Option Law. See INTOXICATING LIQUORS.

ELECTRICITY.

ELECTRICITY—INJURIES FROM CONSTRUCTION AND MAINTENANCE OF STREET RAILROAD—CARE REQUIRED.

1. An electric railway company maintaining and controlling a trolley system must exercise the utmost degree of care in the construction, main-

tenance, inspection, and repair of its wires, so as to keep them harmless at places where persons are liable to come in contact with them, and its duty is not lessened as to servants of a telephone company, where, under an agreement, it is permitted to attach its wires to poles of the telephone company.—*Gentskow v. Portland Railway Co.* 114.

ELECTRICITY—INJURIES INCIDENT TO PRODUCTION AND USE—CARE REQUIRED.

2. Where an electric railway company and a telephone company jointly use a structure to which the wires of each are attached, each is under the same obligation to the other as persons having common rights in a place are to one another, not negligently to place a dangerous substance on the common territory, where it may be reasonably anticipated that others having common rights may be injured.—*Gentskow v. Portland Railway Co.* 114.

ELECTRICITY—INJURIES INCIDENT TO PRODUCTION AND USE—CARE REQUIRED.

3. An electric railway company permitting for a day and a half a circuit breaker to be displaced, so as to allow a wire of a trolley system to come in contact with a telephone wire, is guilty of actionable negligence, irrespective of how the displacement occurred.—*Gentskow v. Portland Railway Co.* 114.

ELECTRICITY—INJURIES INCIDENT TO PRODUCTION AND USE—CARE REQUIRED.

4. An owner of electrically charged wires, which became disarranged without his negligence, is entitled only to a reasonable time after the condition arises, in which to discover and remove the dangers resulting therefrom.—*Gentskow v. Portland Railway Co.* 114.

ELECTRICITY—INJURIES INCIDENT TO PRODUCTION AND USE—CARE REQUIRED.

5. An electric railway company, maintaining a trolley system, is under the duty of continuous inspection of its wires.—*Gentskow v. Portland Railway Co.* 114.

ELECTRICITY—INJURIES INCIDENT TO PRODUCTION AND USE—CARE REQUIRED.

6. In the absence of proof that wires forming a part of a trolley system were cut by trespassers, the inference is that it was done by some one on behalf of the owner of the system, for the purpose of rearranging the position of the wires.—*Gentskow v. Portland Railway Co.* 114.

ELECTRICITY—INJURIES INCIDENT TO PRODUCTION AND USE—CARE REQUIRED.

7. Evidence held sufficient to go to the jury on the issue of the negligence of an electric railway company maintaining a trolley system resulting from its permitting its trolley service wire to fall on a trolley wire and thereby permit the escape of electricity.—*Gentskow v. Portland Railway Co.* 114.

ELECTRICITY—INJURIES FROM PRODUCTION AND USE—CONTRIBUTORY NEGLIGENCE.

8. One who knew, or who should have known, that wires supporting a trolley service wire were charged with a dangerous current of electricity, and who voluntarily exposed himself to the risk of being shocked thereby, was chargeable with contributory negligence precluding a recovery for the injuries received.—*Gentskow v. Portland Railway Co.* 114.

ELECTRICITY—INJURIES FROM PRODUCTION AND USE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

9. Whether an employee of a telephone company coming in contact with an electrically charged iron peg in a telegraph pole, in consequence of the negligence of an electric railway company maintaining a trolley system, was guilty of contributory negligence, held, under the evidence, for the jury.—*Gentskow v. Portland Railway Co.* 114.

ELECTRICITY—INJURIES FROM PRODUCTION AND USE—CONTRIBUTORY NEGLIGENCE.

10. An employee of a telephone company may assume that a wire of an electric railway company not intended to carry electricity and attached to a telephone pole, under an agreement with the telephone company, is harmless.—*Gentskow v. Portland Railway Co.* 114.

EMINENT DOMAIN.

EMINENT DOMAIN—PETITION FOR ROAD—GATEWAY—EXPENSE OF FENCING.

Laws 1876, p. 26. (Hill's Ann. Laws 1892, § 4075), provided for the opening of "roads of public easement." Laws 1899, page 164 (Section 4966, B. & C. Comp.).

provided for a county road thirty feet wide, or a gateway not less than ten nor more than thirty feet wide. Laws 1908, p. 260, § 20, provided that a board of county viewers should locate the road, and as amended by Laws 1907, p. 255, provided for a road not exceeding sixty feet wide, or a gateway not less than ten nor more than thirty feet wide, to be viewed out and located by a board of county viewers. *Held*, that where a county road "and" gateway were petitioned for, but the lower courts recognized the proceedings to be for the establishment of a gateway, and not for an open road, and so established it, the expense of fencing the road was not an element of the damages suffered by the owners of the land through which the road passes. — *In re Sage*. *Yoran v. Sage*, 587.

ESCROWS.

ESCROWS—UNAUTHORIZED DELIVERY.

A deed left in escrow, which is improperly delivered by the depository without compliance with a condition requiring payment of the consideration named, passes no title. — *Bradford v. Durham*, 1.

ESTATES.

Of Decedents. See EXECUTORS AND ADMINISTRATORS.

ESTOPPEL.

ESTOPPEL—ESTOPPEL TO DENY DEDICATION.

1. Where defendants sold a number of lots, and represented to the purchasers that a tract adjacent thereto would be opened as a street, receiving an increased price for the lots because of their proximity to the proposed streets, defendants were estopped to deny that the strip was dedicated as a public street. — *Morse v. Whitcomb*, 412.

ESTOPPEL—EVIDENCE—PAROL EVIDENCE.

2. While ordinarily purchasers of lots shown on plats thereof cannot claim more than is shown by the plat, where plaintiffs purchased lots upon representations that an adjacent tract which was shown on the plats as fractional lots would be opened as a street, they could show such representations by parol by way of estoppel; such evidence not being admitted to vary the plat. — *Morse v. Whitcomb*, 412.

EVIDENCE.

EVIDENCE—SANITY—OPINION—REASON.

1. An opinion as to the sanity of the grantor by a subscribing witness to a mortgage was without weight, where it was limited to the witness' observation at the time of the taking the acknowledgment, and the witness did not give any reason for his opinion, as required by Section 718 B. & O. Comp. — *Bowman v. Wade*, 347.

EVIDENCE—TRANSCRIPT ON APPEAL.

2. Where it is contended that the evidence was not sufficient to justify the verdict, the transcript on appeal must show the objections to be well taken, otherwise the court will not devote the time nor occupy the space to discuss it. — *State v. Minnick*, 86.

EVIDENCE—TRIAL—REBUTTAL EVIDENCE—ADMISSIBILITY.

3. The state in a criminal prosecution *held* not entitled to prove on rebuttal admissions made by defendant without limiting the evidence to the purpose of impeachment. — *State v. Minnick*, 86.

EVIDENCE—CONTRIBUTORY NEGLIGENCE.

4. Where the evidence offered to establish negligence of defendant, resulting in injury to plaintiff, showed that plaintiff was guilty of negligence, without which the injury would not have occurred, plaintiff could not recover. — *Gentskow v. Portland Railway Co.*, 114.

EVIDENCE—NEGATIVE AND POSITIVE EVIDENCE.

5. The comparative value of positive and negative testimony depends on the means of knowledge of the witnesses, their opportunity to know the facts and their apparent candor and demeanor on the witness stand. — *Russell v. Oregon R. & N. Co.*, 128.

EVIDENCE—WEIGHT OF EVIDENCE—INSTRUCTIONS.

6. Under the statute providing that the jury are the sole judges of the evidence, an instruction that the testimony of a witness that a thing actu-

ally occurred, is of more value than the testimony of a witness who says he did not see or hear the occurrence, is an invasion of the province of the jury.—*Russell v. Oregon R. & N. Co.* 128.

EVIDENCE—EJECTMENT—IDENTITY OF LAND.

7. Evidence held insufficient to identify an alleged strip of land between the true boundaries of two tracts according to government surveys.—*Seabrook v. Coos Bay Ice Co.* 174.

EVIDENCE—BOUNDARIES—LOCATION.

8. The location of the beginning point of a survey would not be regarded as established by the testimony of a witness, who was present when the survey was made, as to his recollection of its location, after the lapse of thirty-four years.—*Seabrook v. Coos Bay Ice Co.* 174.

EVIDENCE—BOUNDARIES—BEGINNING CORNER—LOCATION.

9. Evidence held to show that the northeast corner of a certain lot had not been properly located in the Whereat's survey, and could not, therefore, be taken as the starting point from which to locate an angle to which such survey was tied.—*Seabrook v. Coos Bay Ice Co.* 174.

EVIDENCE—SUFFICIENCY—MECHANICS' LIENS.

10. One seeking to establish a lien for materials and labor furnished to a contractor, must make a definite showing as to value in order to prevail.—*Laughlin v. Connors*, 184.

EVIDENCE—SUFFICIENCY—MECHANICS' LIENS.

11. Evidence examined, and held insufficient to establish a lien for any definite amount for labor and materials furnished a contractor.—*Laughlin v. Connors*, 184.

EVIDENCE—COMPENSATION—COMPETENCY.

12. In condemnation proceedings, evidence of what plaintiff paid for other property for use in the same enterprise is incompetent, whether offered as substantive evidence, or on cross-examination as a test of an expert's knowledge.—*Oregon R. & N. Co. v. Eastlack*, 196.

EVIDENCE—OBJECTIONS—SUFFICIENCY.

13. The rule that objections to evidence must be specific does not apply, where the evidence is clearly inadmissible for any purpose, in which case a general objection is sufficient.—*Oregon R. & N. Co. v. Eastlack*, 196.

EVIDENCE—RECEPTION OF EVIDENCE—OBJECTIONS.

14. In condemnation proceedings, an objection to evidence of what plaintiff paid for other property for use in the same enterprise, on the ground that the evidence was not the measure of value, was sufficient to raise the question of the admissibility of such evidence, offered as substantive evidence, or on cross-examination as a test of an expert's knowledge of value.—*Oregon R. & N. Co. v. Eastlack*, 196.

EVIDENCE—RELEVANCY—VALUE.

15. In condemnation proceedings, evidence of what the property was sold for, or was estimated to have brought, in an exchange made twelve or fifteen years before, is inadmissible.—*Oregon R. & N. Co. v. Eastlack*, 196.

EVIDENCE—OPINIONS—FACTS FORMING A BASIS OF OPINION.

16. In condemnation proceedings, a witness cannot base his opinion of the value of the land sought to be taken on what he had heard plaintiff had paid for other land for use in the same enterprise.—*Oregon R. & N. Co. v. Eastlack* 196.

EVIDENCE—FACTS AND CONCLUSIONS.

17. Where the complaint, in an action for injuries to a coal miner engaged in taking cars up and down an incline, alleged that the master negligently permitted the signal system used in the miner's work to get out of repair, and that the master was negligent in the manner of moving the cars on the incline, the testimony of the miner that the signal system was out of repair, and that the cars could have been let down the incline by steam power, stated facts, and not the conclusion of the witness.—*Ferrari v. Beaver Hill Coal Co.* 210.

EVIDENCE—INJURIES TO SERVANT—PROXIMATE CAUSE.

18. A servant suing for a personal injury, who introduces evidence of the defective condition of an appliance, as alleged in the complaint, must show that the injury might have been avoided if the appliance had been in repair.—*Ferrari v. Beaver Hill Coal Co.* 210.

EVIDENCE—ADMISSIBILITY—DAMAGES—PERSONAL INJURY.

19. In an action by an infant for personal injury, his testimony as to the length of time he was able to work after the injury, and prior to the trial, was competent to show the extent of the injury and the probable effect it might have on his future earning capacity, though no damage could be assessed for loss of time during his minority.—*Ferrari v. Beaver Hill Coal Co.* 210.

EVIDENCE—SUBSEQUENT CONDUCT—NEGLIGENCE.

20. Evidence of additional precautions or of subsequent repairs is not competent to prove antecedent negligence, but it may be competent as showing that the property where the injury was received belonged to, or was in control of, defendant.—*Ferrari v. Beaver Hill Coal Co.* 210.

EVIDENCE—TRIAL—STRIKING OUT OF EVIDENCE.

21. Hearsay evidence should be stricken out, though it was elicited on cross-examination by the parties objecting thereto.—*State v. Osborne*, 289.

EVIDENCE—ACTS OF CODEFENDANT.

22. In a prosecution for an assault with intent to rape, the admission of evidence of a previous similar assault on the daughter of the prosecuting witness by a codefendant not on trial is reversible error.—*State v. Osborne*, 289.

EVIDENCE—JUDICIAL NOTICE—CHARTERS OF MUNICIPAL CORPORATIONS.

23. A charter of a city is a public law of the state of which the courts take judicial notice.—*Naylor v. McColloch, Mayor*, 305.

EVIDENCE—PAROL EVIDENCE.

24. In an action on a parol contract, letters and telegrams passing between the parties some 3½ months after the making of the contract are not primary evidence of the terms thereof though they contain references as to what the parties understood as a part of the contract, but are admissible as admissions of what had been previously concluded between them, subject to explanation by them.—*Mahon v. Rankin*, 323.

EVIDENCE—RELEVANCY—FACTS FORMING PART OF TRANSACTION.

25. Where, in an action for commissions for buying land for defendant, plaintiff offered testimony as to an arrangement by defendant with another to assist plaintiff in buying the land, in order to show that defendant authorized the purchase of a tract upon certain terms, which were communicated to defendant by such other testimony in connection with such evidence as to the compensation defendant was to pay the other, was not admissible under Section 702, B. & C. Comp., permitting the whole of an act or declaration to be inquired into by the other party, where a part thereof is given in evidence by one party; defendant not having offered any part of the transaction with such other in evidence or testified as to the terms of his employment.—*Mahon v. Rankin*, 323.

EVIDENCE—RELEVANCY—FACTS FORMING PART OF TRANSACTION.

26. In order to be admissible under Section 702, B. & C. Comp., permitting the whole of any declaration or conversation on the same subject to be inquired into by the other party, where a part thereof is given in evidence by one party, the rest of the conversation must be material, and affect in some way the part already given in evidence.—*Mahon v. Rankin*, 323.

EVIDENCE—ADMISSIONS—CONCLUSIVENESS.

27. In an action for commissions earned by the purchase of land for defendants, where plaintiff claimed that the agreement was that he should receive \$1 an acre when he secured options on the land and deposited the deeds in escrow, but defendant claimed that he was not to receive any commissions unless defendant exercised his option and resold the land, and defendant introduced letters from plaintiff, written after plaintiff had stated in another letter to defendant that he had purchased the land, and considered his part of the contract fulfilled, which letters related to securing control of certain land, the options on which had expired after plaintiff had obtained them, and were introduced as being admissions against plaintiff's interest and tending to show that he had an interest in the disposal of the option lands, plaintiff could explain the letters and show that they related to another contract made with defendant; written admissions not being conclusive, but being subject to rebuttal or explanation.—*Mahon v. Rankin*, 323.

EVIDENCE—COMPETENCY—INTENT.

28. The intent of a person in doing an act, or in uttering a declaration, when material, may be testified to by the actor, whether he is a party or not, and however inconclusive or inconsistent his testimony may be; that going only to its weight.—*Mahon v. Rankin*, 323.

EVIDENCE—HOMICIDE—THREATS.

29. Where a killing is not deliberate and not in cool blood, previous threats made by one defendant are not evidence against a codefendant who had no knowledge thereof.—*State v. Walsworth*, 371.

EVIDENCE—FALSE PRETENSES—VARIANCE.

30. Where an indictment for false pretenses charged that defendant received money, evidence showing that he received prosecutor's check on a bank, which defendant cashed before he was arrested, did not constitute a variance; the check being merely the vehicle by which defendant obtained the money.—*State v. Germain*, 395.

EVIDENCE—FALSE PRETENSES—ORAL TESTIMONY—CORROBORATION.

31. Section 1812, B. & C. Comp., defining "false pretenses," does not require the pretense to be in writing; but Section 1407 declares that, on a trial for obtaining from any person any valuable thing by false pretenses, no evidence can be admitted of a false pretense expressed orally and unaccompanied by a false token or writing, but such pretense or some note or memorandum thereof must be in writing and either subscribed by or in the handwriting of the defendant. *Held*, that such section does not require that the memorandum contain the whole pretense, but that it should accompany and corroborate the oral evidence thereof, and hence, where the fraudulent representation was in writing, parol evidence of the conversation had between prosecutor and defendant at the time was admissible to corroborate the writing.—*State v. Germain*, 395.

EVIDENCE—PAROL EVIDENCE.

32. Where a receipt given for money pursuant to alleged fraudulent representations contained the letters "S. B. Lumbr. Co." to designate the name of a business concern to which prosecutor was referred for employment, parol evidence was admissible to explain the meaning of such letters and abbreviations.—*State v. Germain*, 395.

EVIDENCE—OTHER OFFENSES—MOTIVE—INTENT.

33. In a prosecution for false pretenses, testimony concerning similar offenses was admissible to show motive and fraudulent intent.—*State v. Germain*, 395.

EVIDENCE—REBUTTAL—CRIMINAL LAW.

34. Where, in a prosecution for false pretenses, the State introduced evidence of other similar offenses to show motive and fraudulent intent, the court properly permitted defendant to explain the transactions proved by the State, but refused to allow defendant to prove additional instances not otherwise referred to, in which he had returned money received from employees for whom he had failed to procure employment.—*State v. Germain*, 395.

EVIDENCE—LARCENY—SUFFICIENCY OF EVIDENCE.

35. Evidence *held* sufficient to justify a conviction of general larceny of a horse, and not of a larceny by altering a brand.—*State v. Moxley*, 409.

EVIDENCE—EVIDENCE FOUNDED ON HEARSAY—REPUTE AS TO FACTS—OWNERSHIP.

36. In a suit to enjoin the closing of an alleged street which plaintiffs claim defendants represented, upon selling lots to them, would remain open as a street, evidence that the strip was known by the public in general as T street, and appeared upon the city and telephone directories, and was called out by the street car conductor, by that name, and that mail was addressed to residents in that vicinity as on that street, was admissible in connection with numerous other circumstances tending to show that the strip was reserved for a street to show how it was generally treated by the public in that vicinity, Section 783, subd. 12, B. & C. Comp., making it a disputable presumption that one is the owner of property from common reputation of his ownership.—*Morse v. Whitcomb*, 412.

EVIDENCE—HEARSAY—REPUTE AS TO FACTS—OWNERSHIP.

37. Common or general reputation is admissible to show a fact in which the public have an interest or which directly affects the mass of the people in a locality.—*Morse v. Whitcomb*, 412.

EVIDENCE—SUFFICIENCY.

38. In a suit to enjoin the closing of an alleged street which plaintiffs claimed that defendants represented, upon selling lots to them, would remain open as a street, evidence *held* to show that plaintiffs purchased the land with the understanding that the tract would be open as a street.—*Morse v. Whitcomb*, 412.

EVIDENCE—ADMISSIBILITY.

39. In an action to restrain the closing of a tract which plaintiffs claim defendants represented, upon selling lots to them, would be open as a street, a map showing various streets platted in lots of uniform size, with a number of smaller lots along the strip which plaintiffs claim was intended to be reserved as a street, was admissible to corroborate plaintiffs' testimony as to defendants' statement that that tract would be opened as a street.—*Morse v. Whitcomb*, 412.

EVIDENCE—PAROL EVIDENCE—ESTOPPEL.

40. While ordinarily purchasers of lots shown on plats thereof cannot claim more than is shown by the plat, where plaintiffs purchased lots upon representations that an adjacent tract which was shown on the plats as fractional lots would be opened as a street, they could show such representations by parol by way of estoppel; such evidence not being admitted to vary the plat.—*Morse v. Whitcomb*, 412.

EVIDENCE—HIGHWAYS—EXISTENCE.

41. The existence of a street or highway may be proved by showing a parol dedication accompanied by the user thereof by the public.—*Morse v. Whitcomb*, 412.

EVIDENCE—DEDICATION—PUBLIC STREET—ESTOPPEL.

42. Evidence examined and held sufficient to establish the fact that defendants dedicated, as a public street, the strip of land in controversy, and should be enjoined from in any manner obstructing it.—*Morse v. Whitcomb*, 412.

EVIDENCE—IRRIGATION—FINDINGS.

43. In a suit to enjoin defendant from interfering with the flow of water into complainant's irrigation ditch, evidence held to warrant a finding that defendant had unlawfully diverted the water from the main ditch, and that this was the cause of plaintiff's water shortage and the impairment of his crops.—*Simpson v. Harrah*, 448.

EVIDENCE—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE—NEGLIGENCE.

44. Evidence, in an action against a master to recover for injuries to a servant, held to make the question of defendant's negligence and whether plaintiff assumed the risk incident to machinery around which he was working, for the jury.—*Bigelow v. Columbia Gold Mining Co.* 451.

EVIDENCE—CRIMINAL LAW—OTHER OFFENSES.

45. While proof of other offenses having no connection with that charged, is ordinarily inadmissible, the State, to establish intent or motive, may show other crimes committed by accused which are connected with the offense charged.—*State v. Hembree*, 463.

EVIDENCE—CRIMINAL LAW—ELEMENTS OF CRIME—MOTIVE.

46. The existence of a motive for the commission of a crime is not indispensable to conviction, though such proof is of great importance in cases depending on circumstantial evidence.—*State v. Hembree*, 463.

EVIDENCE—INFERENCES—INFERENCE ON INFERENCE.

47. Under Section 783, B. & O. Comp., defining inference as a deduction which the reason of the jury makes from the facts proved without any express direction of law, and Section 786, requiring an inference to be founded on a fact legally proved, or on such a deduction from that fact as is warranted by the usual propensities or passions of men, etc., an inference cannot be predicated upon an inference, so that where accused's sexual intercourse with his daughter was not legally proved as a fact, it would not support an inference of motive for the killing of his daughter and wife.—*State v. Hembree*, 463.

EVIDENCE—CRIMINAL LAW.

48. The presence of semen on a bed sheet cannot be held to be shown by evidence of the existence of a whitish liquid on, or a starchy condition of, the sheet, but the existence of spermatozoa should have been established therein.—*State v. Hembree*, 463.

EVIDENCE—CRIMINAL LAW.

49. The relationship of father and daughter excludes any presumption of sexual relations between them merely from their intimate association, and a much greater degree of proof would be necessary to justify a criminal inference than if such relationship had not existed.—*State v. Hembree*, 463.

EVIDENCE—SUFFICIENCY OF EVIDENCE—MOTIVE.

50. In a prosecution for murder by setting fire to accused's house in which his wife and daughter were burned, where the State's theory was that accused

had committed incest with his daughter, of which his wife had learned, thus furnishing a motive for the crime, evidence held not to establish incest as a fact in evidence.—*State v. Hembree*, 468.

EVIDENCE—OTHER OFFENSES—MOTIVE.

51. Where the defendant's act in killing deceased arose from the persistence of deceased's prosecution of defendant, resulting in his suspension from practice as an attorney, the record showing the charges preferred by deceased as prosecutor for the State Bar Association against defendant, accusing him of drunkenness while trying a case in court, the issuance of checks on a bank where he had no funds, and of unlawfully affixing a notarial seal to certain pension papers, etc., was competent as evidence of motive, though it showed defendant was guilty of other offenses.—*State v. Finch*, 482.

EVIDENCE—HOMICIDE—MOTIVE.

52. Where, in a prosecution for homicide, the court permitted evidence of a prosecution of defendant by deceased, for conduct unbecoming an attorney, to show motive for the killing, the truth of the charges in such proceeding was not in issue, and the court properly refused to permit defendant to go into the merits thereof.—*State v. Finch*, 482.

EVIDENCE—CRIMINAL LAW—LOCUS IN QUO—PLAT.

53. In a prosecution for homicide, a plat of decedent's office, drawn to a scale by an expert, and shown by his testimony to be a generally fair and accurate representation of the *locus in quo* shortly after the homicide, was admissible, not as substantive evidence, but to aid in understanding the testimony.—*State v. Finch*, 482.

EVIDENCE—CRIMINAL LAW—PHOTOGRAPH OF DECEASED.

54. Where the physician who performed the autopsy was not personally acquainted with deceased, the court properly permitted a photograph, proven to be a correct likeness of deceased, taken in health, to be introduced to identify the body of the person on whom the autopsy was performed as that of deceased.—*State v. Finch*, 482.

EVIDENCE—CRIMINAL LAW—PAROL EVIDENCE.

55. Where defendant killed deceased because of the latter's zeal in prosecuting charges against defendant for disbarment, and it did not appear that deceased's appointment as prosecutor for the Bar Association was other than oral, or that it had records of any kind, the fact that deceased was prosecutor for the association was provable by parol.—*State v. Finch*, 482.

EVIDENCE—SUFFICIENCY.

56. A plaintiff having the burden of proof in a civil action must introduce such testimony as will reasonably show his right of recovery, but he need not prove his case beyond a reasonable doubt, and, where the evidence produced by the respective parties does not preponderate in favor of plaintiff, the jury must find for defendant.—*Willett v. Kinney*, 584.

EVIDENCE—SUFFICIENCY.

57. Where the evidence is equally balanced, or so close as to make it doubtful which party has presented the greater weight of evidence, the verdict should be against the party having the burden of proof, but the mere fact that the evidence of plaintiff leaves the jury in doubt as to what the amount of the verdict should be, does not require a finding for defendant.—*Willett v. Kinney*, 584.

EXCEPTIONS.

Bill of. See BILL OF EXCEPTIONS.

EXECUTORS AND ADMINISTRATORS.

EXECUTORS AND ADMINISTRATORS—TORTS—LIABILITY.

1. An action does not lie against an executor or administrator in his representative character for a wrongful act committed by him while administering the estate, whereby a personal injury is inflicted on another, but he must be sued as an individual, and a judgment against him personally must rest either on the principle of *respondet superior* or on the breach of some duty amounting to actionable negligence, or on his independent tort.—*Felling v. Winch*, 600.

EXECUTORS AND ADMINISTRATORS—FAILURE TO DISCHARGE DUTIES—LIABILITY.

2. An executor or administrator who neglects to discharge an obligation imposed by law, and thereby injures another, is personally liable therefor.—*Felling v. Winch*, 600.

EXECUTORS AND ADMINISTRATORS—FAILURE TO DISCHARGE DUTIES—LIABILITY.

8. An executor or administrator is personally liable for the torts committed while administering the estate.—*Fetting v. Winch*, 600.

EXECUTORS AND ADMINISTRATORS—FAILURE TO DISCHARGE DUTIES—LIABILITY.

4. An executor in possession of a building for the estate employed a head janitor, who engaged two assistants. One of the assistants was killed, while the other assistant operated the elevator in the building. The head janitor, who was an experienced elevator operator, abandoned the work, and negligently placed one of his assistants in charge thereof. There was nothing to show that the executor derived or expected to receive any advantage from the employment of the head janitor or his assistants. There was no defect in the elevator or machinery connected therewith. *Held*, that the executor was not personally liable for the death of the assistant janitor.—*Fetting v. Winch*, 600.

FACTORS AND BROKERS.

See **BROKERS**.

FALSE PRETENSES.**FALSE PRETENSES—ELEMENTS OF OFFENSE—PASSING OF TITLE.**

1. In order to sustain a conviction of false pretenses, the prosecutor must have been induced to part with the title to the property of which he was defrauded; mere parting with possession being insufficient.—*State v. Germain*, 395.

FALSE PRETENSES—ELEMENTS OF DEFENSE—PASSING WITH TITLE.

2. In a prosecution for obtaining money by false pretenses, consisting of directing prosecutor for \$7.50 to an alleged employer which did not exist, a recital in a receipt for the money that it was a "deposit made subject to securing position" "balance due thirty days from beginning work," and that it would be refunded in case the applicant should produce evidence that he had applied in person to the place where he was directed and failed to get the situation, did not indicate that defendant received the money as bailee and not as payment; his promise to refund indicating an intent not to return the identical money received, but to treat the money as payment for services, and not as a bailment.—*State v. Germain*, 395.

FALSE PRETENSES—REPRESENTATIONS.

3. Defendant received \$7.50 from prosecutor, and executed to him a receipt for that sum, for which defendant agreed to furnish correct information by which prosecutor should be enabled to secure a situation as lumberman with the "S. B. Lumbr. Co. at city." An indictment charged that, at the time the receipt was given, defendant stated to prosecutor that such lumber company was a large firm, partnership, business, or corporation, and that defendant knew such to be the case. *Held*, that defendant's representation that there was such a firm was a representation of an existing fact on which a prosecution for false pretenses could properly be based.—*State v. Germain*, 395.

FALSE PRETENSES—VARIANCE—EVIDENCE.

4. Where an indictment for false pretenses charged that defendant received money, evidence showing that he received prosecutor's check on a bank, which defendant cashed before he was arrested, did not constitute a variance; the check being merely the vehicle by which defendant obtained the money.—*State v. Germain*, 395.

FALSE PRETENSE—EVIDENCE—ORAL TESTIMONY—CORROBORATION.

5. Section 1812, B. & O. Comp., defining "false pretenses," does not require the pretense to be in writing; but Section 1407 declares that, on a trial for obtaining from any person any valuable thing by false pretenses, no evidence can be admitted of a false pretense expressed orally and unaccompanied by a false token or writing, but such pretense or some note or memorandum thereof must be in writing and either subscribed by or in the handwriting of the defendant. *Held*, that such section does not require that the memorandum contain the whole pretense, but that it should accompany and corroborate the oral evidence thereof, and hence, where the fraudulent representation was in writing, parol evidence of the conversation had between prosecutor and defendant at the time was admissible to corroborate the writing.—*State v. Germain*, 395.

FORCIBLE ENTRY AND DETAINER.**FORCIBLE ENTRY AND DETAINER—REVIEW—ADDITIONAL UNDERTAKING.**

1. Section 5748, B. & C. Comp., declares that the rules of practice governing actions generally in a justice's court shall yield to the special procedure provided for forcible detainer. Section 5754 provides that no appeal shall be taken by defendant in forcible detainer until he shall in addition to the undertaking required by law upon appeal, give an undertaking for the payment to plaintiff of twice the rental value of the property of which restitution shall be adjudged. Act February 23, 1907 (Laws 1907, page 132), amends Section 5746, B. & C. Comp., so as to confer concurrent jurisdiction on the circuit court in forcible detainer with a justice's court. *Held*, that the special procedure provided for forcible detainer is not confined to a justice's court, but applies in the circuit court to the exclusion of the usual procedure there, and that the additional bond required by Section 5754 must be given in an action brought in the circuit court as well as if brought in a justice's court.—*Zelig v. Blue Point Oyster Co.* 543.

FORCIBLE ENTRY AND DETAINER—REVIEW—PERMISSION TO FILE OMITTED UNDERTAKING.

2. Section 549, subd. 4, B. & C. Comp., providing that where a party gives notice of appeal, and thereafter omits, through mistake, to do any other act, including the filing of the undertaking required by that section, necessary to perfect the appeal or stay proceedings, he may be permitted to amend or perform such act, does not empower the Supreme Court to permit to be filed the additional undertaking for an appeal required by Section 5754 in unlawful detainer, as it is a condition precedent to the appeal, and in addition to, and not a substitute for, the undertaking required by Section 549.—*Zelig v. Blue Point Oyster Co.* 543.

FOREST GROVE, CHARTER OF.

Haines v. City of Forest Grove, 443.

FRAUDS, STATUTE OF.**FRAUDS, STATUTE OF—SUFFICIENCY OF MEMORANDUM—DESCRIPTION OF PROPERTY.**

1. The written memorandum of an agreement to sell realty should contain sufficient description to show a common intention with reference to a particular piece of property; and a memorandum, dated at Portland, where the parties resided, describing the subject-matter of the contract as lots 3 and 4, block 18, A. H., which the evidence showed meant Albina Homestead, of which a plat had been duly recorded in Multnomah County, in which Portland is situated, which plat shows a block 18 containing lots 3 and 4, taken in connection with admissions in the pleading that defendant owned lots 3 and 4, block 18, in Multnomah County, Oregon, sufficiently identifies the property described to satisfy the statute of frauds, though the writing did not state the county and the state in which the property was situated.—*Flegel v. Dowling*, 40.

FRAUDS, STATUTE OF—REQUISITES OF WRITING—SIGNATURE—SIGNING BY AGENT.

2. The real estate agent's authority being only to find a purchaser for the owner, and not to execute a contract of sale, it is unnecessary that his authority be in writing, in order to bind a purchaser from the owner, who was procured by the agent, so that, where the memorandum merely acknowledged receipt by the agent of an offer from the owner to the purchaser upon the terms stated therein, subject to the owner's approval, the agent's authority could be shown by parol evidence.—*Flegel v. Dowling*, 40.

FRAUDS, STATUTE OF—REQUISITES OF MEMORANDUM—DESCRIPTION OF PARTIES.

3. The memorandum evidencing a contract to sell realty must show the parties to the contract by some reference sufficient to identify them, and is sufficient if it shows with reasonable certainty the other party to the contract, in addition to containing the signature of the party to be charged.—*Flegel v. Dowling*, 40.

FRAUDS, STATUTE OF—SUFFICIENCY OF MEMORANDUM—SEPARATE WRITINGS.

4. Several writings may be taken together to show a memorandum sufficient to satisfy the statute of frauds, and the writings are sufficient if, when taken together, they constitute a memorandum subscribed by the party to be charged, and showing the contracting parties, the subject-matter, and consideration.—*Flegel v. Dowling*, 40.

FRAUDS, STATUTE OF—SUFFICIENCY OF MEMORANDUM—SEPARATE WRITINGS—PAROL EVIDENCE TO CONNECT WRITINGS.

5. A writing signed by defendant acknowledged receipt from M. of \$45, part payment on lots 3 and 4, block 18, Albina Homestead, purchase price \$300, payable \$350 cash, and remainder in three years at 6 per cent interest, and stated that the purchaser assumed a sewer assessment; and another writing, signed by M. as agent, recited receipt from plaintiff's assignor of \$50, part payment on lots 3 and 4, block 18, Albina Homestead, purchase price \$300, with a sewer assessment, terms \$350 cash, and balance in three years at 6 per cent, and stated that it was subject to the owner's approval. In an action by plaintiff to compel a conveyance of the property described in the writings, plaintiff offered to show by parol evidence that his assignor was the purchaser of the property, and that M. was defendant's agent to bring the parties together, and not the purchaser, as indicated by the first memorandum. *Held*, that the evidence was admissible to connect the instruments and show the nature of the transaction to which they referred, and that plaintiff's assignor, and not M., was the real purchaser.—*Flegel v. Dowling*, 40.

FRAUDS, STATUTE OF—SUFFICIENCY OF MEMORANDUM—SALE OF REAL PROPERTY.

6. The writings, when taken together and explained by the surrounding circumstances, are sufficient, within the statute of frauds, to show a valid contract by defendant with plaintiff's assignor to sell the property upon the terms stated therein.—*Flegel v. Dowling*, 40.

FRAUDS, STATUTE OF—CONTRACT TO PAY MONEY—PART PERFORMANCE.

7. Where a defendant borrowed money from plaintiff under an agreement that the amount should stand as a loan for three years at ten per cent, and that the amount should be secured by a mortgage on real estate, such agreement, having been completely performed by plaintiff, was not within the statute of frauds as a contract not to be performed within a year.—*Bowman v. Wade*, 347.

FRAUDS, STATUTE OF—CONTRACTS IMPLIED—LOANS—UNENFORCEABLE CONTRACT.

8. Where plaintiff loaned money to defendant to be repaid with interest at ten per cent in three years, plaintiff was entitled to recover the sum loaned with legal interest in assumpsit for money received, though the contract was unenforceable under the statute of frauds.—*Bowman v. Wade*, 347.

GOVERNMENT LANDS.

Same as EMINENT DOMAIN.

GRAND JURY.

GRAND JURY—RIGHT TO IMPANEL—INDICTMENT.

Where the court ordered a grand jury to be regularly drawn, and accused was indicted thereby, it was not material whether the constitutional amendment of June 1, 1908, providing that thereafter no person should be charged in the circuit court with any crime except by indictment by grand jury, was then in force, since the statute previously existing, and permitting the commencement of a criminal action by information, also permitted the court in its discretion to call a grand jury.—*State v. Finch*, 482.

GUARDIAN AND WARD.

GUARDIAN AND WARD—DUTY OF GUARDIAN TO DISAFFIRM MORTGAGE.

The guardian of an insane person has no discretion to ratify a mortgage given by his ward, but is bound at his peril to disaffirm and avoid it.—*Bowman v. Wade*, 347.

HABEAS CORPUS.

HABEAS CORPUS—CUSTODY OF CHILD—DEATH OF MOTHER HAVING CUSTODY.

1. The father, being worthy and capable of properly caring for his child, custody of which on his obtaining a divorce was given to its mother, will as its rightful custodian on her death be given its custody in habeas corpus as against the mother's parents, with whom she left it to take care of and keep.—*Ex parte Barnes. Barnes v. Long*, 548.

HABEAS CORPUS—CUSTODY OF CHILD—REMOVAL FROM STATE.

2. A child, custody of which was given its mother on its father obtaining a divorce from her in Washington, and which by permission of the court

granting the divorce was taken by her to Oregon, may properly be taken back by its father on his recovering its custody on her death.—*Ex parte Barnes, Barnes v. Long*, 548.

HAWKERS AND PEDDLERS.

Requiring Venders of Drugs, etc., to Procure License From Board of Pharmacy, Was a Proper Exercise of Police Power, and Not in Violation of Section 20, Article I, of the Constitution of Oregon. See CONSTITUTIONAL LAW, 2.

HIGHWAYS.

HIGHWAYS—PROCEEDINGS TO VACATE—NOTICES.

1. Laws 1903, p. 264, § 8, provide that, when a petition shall be presented to the county court for vacating a county road, it shall be accompanied by satisfactory proof that notice has been given by advertisement, posted thirty days previous to the presentation of the petition to the court at its next session. Notices were posted September 3d, reciting that application to vacate part of a county road would be made to the county court at its next session on October 3d. Held that, as the thirty days limited for the posting of the notices did not expire until the last hour of October 3d, they were posted only twenty-nine days prior to the next session of the county court, and the court did not acquire jurisdiction.—*Rynearson v. Union County*, 181.

HIGHWAYS—VACATION—PROCEEDINGS—CERTIORARI.

2. When attention is called to a lack of jurisdiction, the duty devolves upon the court to set aside the proceedings and purge the record of informalities, though the defect has not been challenged in a formal way, and hence upon writ of review in the circuit court to review proceedings in the county court to vacate a highway, where it appeared that the county court had not acquired jurisdiction, its order vacating the road was properly set aside, though its power to hear and determine the matter had not been formally challenged.—*Rynearson v. Union County*, 181.

HIGHWAYS—EASEMENTS—OBSTRUCTIONS.

3. Where a party seeks to restrain an obstruction of a highway or easement, the injured party is not limited or confined to that part of the roadway or easement abutting upon or in front of his premises.—*Morse v. Whitcomb*, 412.

HIGHWAYS—EXISTENCE—EVIDENCE.

4. The existence of a street or highway may be proved by showing a parol dedication accompanied by the user thereof by the public.—*Morse v. Whitcomb*, 412.

HIGHWAY—PETITION FOR ROAD—GATEWAY—EXPENSE OF FENCING.

5. Laws 1876, p. 25 (Hill's Ann. Laws 1892, § 4075), provided for the opening of "roads of public easement." Laws 1899, page 164 (Section 4966, B. & O. Comp.), provided for a county road thirty feet wide, or a gateway not less than ten nor more than thirty feet wide. Laws 1903, p. 269, § 20, provided that a board of county viewers should locate the road, and as amended by Laws 1907, p. 258, provided for a road not exceeding sixty feet wide, or a gateway not less than ten nor more than thirty feet wide, to be viewed out and located by a board of county viewers. Held, that where a county road "and" gateway were petitioned for, but the lower courts recognized the proceedings to be for the establishment of a gateway, and not for an open road, and so established it, the expense of fencing the road was not an element of the damages suffered by the owners of the land through which the road passes.—*In re Sage, Yorlan v. Sage*, 587.

HOLIDAYS.

HOLIDAYS—JUDICIAL PROCEEDINGS—"JUDICIAL BUSINESS."

1. Under the statute providing that no court shall be open nor any judicial business be transacted on legal holidays, service of notice of appeal is not judicial business, and such notice may be served on a legal holiday other than Sunday.—*Ferrari v. Beaver Hill Coal Co.*, 210.

HOLIDAYS—CRIMINAL LAW—TRIAL—ACQUITTAL.

2. Under Section 953, B. & O. Comp., where, pending trial of accused, the Governor proclaimed certain holidays, but no court was held during three days, on which no holidays were proclaimed, the jury was thereby discharged for the term, which amounted to an acquittal.—*State v. Turpin*, 267.

HOMICIDE.

HOMICIDE—DEFENSE OF RELATIVE—INSTRUCTIONS.

1. Defendants, father and son, were indicted for murder. The son, who fired the fatal shot, testified that, after his father had held up his hands in token of submission, deceased and his relatives continued shooting into the house where the son found his father wounded and covered with blood, and, believing that his mother was also in the house, he picked up his father's rifle and fired the fatal shot, believing his own life and that of his mother to be in danger. *Held*, that the court's failure to charge on the son's right to protect his mother from danger from an alleged unjustifiable attack on the house by deceased and his brother, was error.—*State v. Walsworth*, 371.

HOMICIDE—DEFENSE OF RELATIVE.

2. Where one of the defendants honestly believed that his mother was in the house when deceased continued to shoot at or into the house without apparent necessity, defendant was entitled to act on appearances, and if the circumstances were such as would have led a reasonably prudent man to believe, and he did believe, that his mother's life was in danger, he was entitled to shoot in her defense.—*State v. Walsworth*, 371.

HOMICIDE—EVIDENCE—THREATS.

3. Where a killing is not deliberate and not in cool blood, previous threats made by one defendant are not evidence against a codefendant who had no knowledge thereof.—*State v. Walsworth*, 371.

HOMICIDE—INDICTMENT—SUFFICIENCY—VOLUNTARY HOMICIDE.

4. An indictment, alleging that accused feloniously and voluntarily administered a suppository containing poison to another, from the effects of which she died, was insufficient, under Section 1745, B. & C. Comp., making it manslaughter to voluntarily kill another upon a sudden heat of passion, but without malice and deliberation, in that it did not allege facts constituting voluntary manslaughter.—*State v. Whitney*, 438.

HOMICIDE—INDICTMENT—SUFFICIENCY—INVOLUNTARY MANSLAUGHTER.

5. An indictment, alleging that accused feloniously and voluntarily administered poison to another, from the effects of which she died, did not charge involuntary manslaughter, under Section 1746, B. & C. Comp., making it involuntary manslaughter to involuntarily kill another, while engaged in the commission of an unlawful act, or a lawful act without due caution, in that it did not allege facts showing any unlawful act, or a lawful act negligently committed.—*State v. Whitney*, 438.

HOMICIDE—INDICTMENT—MALICE—INVOLUNTARY MANSLAUGHTER.

6. In a prosecution, under Section 1746, B. & C. Comp., making it involuntary manslaughter to involuntarily kill another while engaged in the commission of an unlawful act, or a lawful act negligently committed, the indictment need not allege malice.—*State v. Whitney*, 438.

HOMICIDE—INDICTMENT—INTENT—INVOLUNTARY MANSLAUGHTER.

7. In a prosecution under Section 1746, B. & C. Comp., making it involuntary manslaughter to involuntarily kill another while engaged in the commission of an unlawful act, or a lawful act negligently committed, an indictment need not allege an intent to kill; the criminal element being the commission of an unlawful act, or a lawful act negligently committed, without intention to take life or to do great bodily harm.—*State v. Whitney*, 438.

HOMICIDE—SUFFICIENCY OF EVIDENCE—MOTIVE.

8. In a prosecution for murder by setting fire to accused's house in which his wife and daughter were burned, where the State's theory was that accused had committed incest with his daughter, of which his wife had learned, thus furnishing a motive for the crime, evidence *held* not to establish incest as a fact in evidence.—*State v. Hembree*, 463.

HOMICIDE—MOTIVE—EVIDENCE.

9. Where, in a prosecution for homicide, the court permitted evidence of a prosecution of defendant by deceased, for conduct unbecoming an attorney, to show motive for the killing, the truth of the charges in such proceeding was not in issue, and the court properly refused to permit defendant to go into the merits thereof.—*State v. Finch*, 482.

HOMICIDE—SELF-DEFENSE—INSTRUCTIONS.

10. An instruction that, unless defendant's fear of great bodily harm, or great danger to his life, was such that a reasonably prudent man would have entertained under all the circumstances, then his act in striking the fatal

blow was not justifiable, or excusable, properly stated the law.—*State v. Finch*, 482.

HOMICIDE—CAPITAL PUNISHMENT—CONSTITUTIONAL PROVISIONS.

11. Section 15, Article I, Constitution of Oregon, declaring that laws for the punishment of crime shall be founded on principles of reformation, and not vindictive justice, when construed with Section 11, Article V, authorizing the Governor to grant reprieves, which are applicable only in capital cases, does not impliedly prohibit the infliction of the death penalty as punishment for murder in the first degree.—*State v. Finch*, 482.

HOMICIDE—CRIMINAL LAW—PRESUMPTION—CAPITAL PUNISHMENT.

12. Where a constitutional provision has been copied from the constitution of another state, after it has been construed by the courts of that state, it will be presumed to have been adopted with the construction placed upon it by the courts of the state where it originated, and it must be regarded as settled in this State that the legislature derives authority from the constitution to enact laws for the infliction of punishment by death, in proper cases.—*State v. Finch*, 482.

HOMICIDE—MANSLAUGHTER IN COMMITTING ABORTION—CONSTRUCTION OF STATUTE—ELEMENTS OF CRIME—"PREGNANT WITH CHILD"—"IN CASE OF THE DEATH OF SUCH CHILD."

13. Section 1748, B. & C. Comp., provides that, if any person shall administer to any woman pregnant with a child any medicine, drug, or any substance whatever, or shall use or employ any instruments, or other means, with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of such mother, such person shall, in case the death of such child or mother be thereby produced, be deemed guilty of manslaughter. *Held*, that the term "pregnant with child" as used therein designates the fetus throughout the period of gestation, and the term "in case of the death of such child," which constitutes the consummation of the crime, equally with the death of the mother, would seem to mean the death of the fetus either before or after quickening.—*State v. Atwood*, 528.

HUSBAND AND WIFE.

HUSBAND AND WIFE—NECESSARIES—WIFE'S LIABILITY—STATUTES.

1. Section 5239, B. & C. Comp., providing that husband and wife, or either of them, is chargeable with family expenses, including necessities or household supplies, and that they may be sued jointly in reference thereto, is for the protection of creditors only, and does not change the common-law duty of the husband to maintain his wife during coverture and to provide family necessities, as between them.—*Taylor v. Taylor*, 560.

HUSBAND AND WIFE—WIFE'S SEPARATE PROPERTY—RENTS AND PROFITS—AUTHORITY OF HUSBAND.

2. Where a husband, as his wife's agent, rented her separate property to a merchant tenant, his agreement that the family account for necessities purchased of the merchant should be deducted from the rent was not within the scope of his authority, nor binding on the wife by reason of her mere acquiescence or silence, in the absence of clear and distinct acts on her part showing her consent thereto.—*Taylor v. Taylor*, 560.

HUSBAND AND WIFE—WIFE'S SEPARATE PROPERTY—RENTS—APPLICATION TO TAXES OR IMPROVEMENTS.

3. Where a husband acted as his wife's agent to rent her separate property, he was not, by such fact alone, authorized to apply the rent received to the payment of taxes or improvements.—*Taylor v. Taylor*, 560.

INDICTMENT AND INFORMATION.

INDICTMENT AND INFORMATION—SUFFICIENCY—MODE OF OBJECTION—EFFECT.

1. Where the objection to an indictment for larceny is that it does not state facts constituting a crime, but no demurrer or motion to set aside the indictment was made, if, taking the indictment as a whole, the essential elements constituting the offense of larceny can be found in it, the objection must be overruled.—*State v. Minnick*, 86.

INDICTMENT AND INFORMATION—GRAND OR SIMPLE LARCENY.

2. Under Section 1801, B. & C. Comp., relating to grand larceny, an indictment *held* not sufficient to charge grand larceny.—*State v. Minnick*, 86.

INDICTMENT AND INFORMATION—SUFFICIENCY.

8. Under Section 1808, B. & C. Comp., an indictment charging that defendant "took, carried, stole, led and drove away, two heifers of the value of \$20, contrary to the statutes, etc." held sufficient to charge simple larceny, without the allegation that the taking was felonious.—*State v. Minnick*, 86.

INDICTMENT AND INFORMATION—FORM.

4. An indictment, in general, must contain a specific description of the offense, and not merely the statement of a conclusion of law.—*State v. Miller*, 381.

INDICTMENT AND INFORMATION—STATUTORY OFFENSE.

5. Where a statute creates and defines a new offense, it is sufficient for an indictment thereunder to state the offense in the language of the statute.—*State v. Miller*, 381.

INDICTMENT AND INFORMATION—LANGUAGE OF STATUTE—"ITINERANT VENDER."

6. Laws 1906, p. 222, prohibiting any itinerant vender or hawker of any drug, nostrum, etc., for the treatment of any disease or injury, to offer the same for sale without securing a license from the board of pharmacy, as amended by Laws 1907, p. 281, defining the term "itinerant vender" to include all persons who carry on the business described, by passing from house to house or by haranguing the people on public streets or in public places, or use the customary devices for attracting crowds, and therewith recommending their wares and offering them for sale. Held, that an information in the language of the statute charging that defendant, while being a traveling vender of a drug, offered to sell the same without securing a license, etc., was not demurrable as alleging a mere conclusion of law concerning defendant's occupation; defendant being required to take notice that it was intended to charge that he was an "itinerant vender" as defined in the amendment.—*State v. Miller*, 381.

INDICTMENT AND INFORMATION—INFORMATION—FORM.

7. An information for murder, charging that defendant on May 1, 1908, in M. County, did then and there unlawfully, feloniously, purposely, and of his, the said defendant's, deliberate and premeditated malice, kill and murder, one W., by then and there unlawfully, feloniously, purposely, and of his, the said defendant's, deliberate and premeditated malice, striking, hitting, and beating him, the said W., with a sharp instrument, a more particular description of which is to the district attorney unknown, contrary to the statutes made and provided, and against the peace and dignity of the State, was in substantial compliance with the form prescribed by Section 1204, B. & C. Comp., and form 1 of the appendix, and sufficient.—*State v. Martin*, 408.

INDICTMENT AND INFORMATION—OFFENSE INCLUDED IN CHARGE.

8. Where an indictment for murder in the first degree was sufficient to charge manslaughter, of which accused was convicted, its failure to sufficiently charge murder in the first degree was not material.—*State v. Martin*, 408.

INDICTMENT—SUFFICIENCY—VOLUNTARY HOMICIDE.

9. An indictment, alleging that accused feloniously and voluntarily administered a suppository containing poison to another, from the effects of which she died, was insufficient, under Section 1746, B. & C. Comp., making it manslaughter to voluntarily kill another upon a sudden heat of passion, but without malice and deliberation, in that it did not allege facts constituting voluntary manslaughter.—*State v. Whitney*, 438.

INDICTMENT—SUFFICIENCY—INVOLUNTARY MANSLAUGHTER.

10. An indictment, alleging that accused feloniously and voluntarily administered poison to another, from the effects of which she died, did not charge involuntary manslaughter, under Section 1746, B. & C. Comp., making it involuntary manslaughter to involuntarily kill another, while engaged in the commission of an unlawful act, or a lawful act without due caution, in that it did not allege facts showing any unlawful act, or a lawful act negligently committed.—*State v. Whitney*, 438.

INDICTMENT—MALICE—INVOLUNTARY MANSLAUGHTER.

11. In a prosecution under Section 1746, B. & C. Comp., making it involuntary manslaughter to involuntarily kill another while engaged in the commission of an unlawful act, or a lawful act negligently committed, the indictment need not allege malice.—*State v. Whitney*, 438.

INDICTMENT—INTENT—INVOLUNTARY MANSLAUGHTER.

12. In a prosecution under Section 1746, B. & O. Comp., making it involuntary manslaughter to involuntarily kill another while engaged in the commission of an unlawful act, or a lawful act negligently committed, an indictment need not allege an intent to kill; the criminal element being the commission of an unlawful act, or a lawful act negligently committed, without intention to take life or to do great bodily harm.—*State v. Whitney*, 438.

INDICTMENT AND INFORMATION—WITNESSES—INDORSEMENT—IDENTITY.

13. The object of placing the names of witnesses on the indictment being only to identify the person who testified before the grand jury, the description of a witness whose true name was "Thomas Kinney" as "Thomas Leonard" was not objectionable where it appeared that the witness was a member of an acrobatic trio, known as the "Leonard Bros. Trio," that he was also known as "Thomas Leonard," and that he was employed in a saloon known as "Leonard Bros. Saloon."—*State v. La Rose*, 555.

INDICTMENT AND INFORMATION—DESCRIPTION OF OFFENSE NEGATING EXCEPTIONS IN STATUTE.

14. An indictment must negative exceptions in the statutory description of an offense charged.—*State v. Atwood*, 526.

INDICTMENT AND INFORMATION—DUPLICITY—NUISANCE—OTHER OFFENSE INCLUDED IN CHARGE.

15. An indictment, under Section 1930, B. & O. Comp., for a nuisance in keeping a "maternity hospital" for abortions, charged in connection therewith that defendants in such place, on a specified date, "did willfully and wrongfully commit and produce an abortion upon one M. R., the said M. R. then and there being a woman pregnant with child," and that they also did then and there between certain dates "willfully and wrongfully commit and produce, upon women then and there pregnant with child, the names and number of which are to the grand jury unknown, abortions, contrary to the statute," etc. *Held*, that these allegations of abortions did not state facts constituting a crime, under Section 1748, relating to manslaughter in committing abortions, and were not intended to, but were only allegations of acts done in performance of the purpose charged, which are necessary elements of the nuisance, and do not charge separate offenses.—*State v. Atwood*, 526.

Charging Assault and Robbery *held* Sufficient. See ROBBERY, 1.

INFANTS.**INFANTS—GUARDIAN AD LITEM—DISQUALIFICATION.**

That a client of some of the attorneys in the case was appointed guardian *ad litem* for an infant defendant, did not disqualify him from serving defendant as such, unless the retainer was in the matter relating to the subject in dispute.—*Anderson v. McClellan*, 206.

INITIATIVE AND REFERENDUM.**INITIATIVE AND REFERENDUM—ADOPTION BY ORDINANCE—"ORDAIN."**

1. General Laws 1907, p. 406, c. 226, § 12, provides that a petition for a proposed ordinance, charter, or amendment to the charter of any city shall be filed with the city clerk, who shall transmit it to the next session of the council, which shall either ordain or reject the same, as proposed, within thirty days thereafter; but if rejected, or no action is taken thereon within that time, it shall be submitted to the voters. *Held*, that the word "ordain" is employed in the sense of "adopt" or "approve"; that is, the council may either approve or reject the proposed charter or ordinance, after which proceedings may be taken as therein directed, and hence the adoption of a proposed charter by resolution, instead of by ordinance, was sufficient.—*Haines v. City of Forest Grove*, 443.

INITIATIVE AND REFERENDUM—TITLE.

2. General Laws 1907, p. 406, c. 226, § 12, provides that if any ordinance, charter, or amendment to the charter of any city shall be proposed by petition, and is not rejected or approved by the council within thirty days, the clerk shall submit the bill to the voters at the next ensuing election, and that, if the proposition meets with the approval of the council and they shall so ordain, it may either be submitted to the voters or the council may declare and thereby make it effective without such submission. *Held*, that where a charter was properly proposed and submitted under a resolution approving the bill, the adoption having been regular, the title, reciting that it was a bill

"to propose * * by initiative petition," was sufficient, though it did not appear that it was proposed by a resolution of the council.—*Haines v. City of Forest Grove*, 443.

INITIATIVE AND REFERENDUM—TITLE.

3. General Laws 1907, p. 398, c. 226, relating to the initiative and referendum, provides in Section 5 that when any measure shall be filed with the Secretary of State to be referred to the people, or shall be proposed by initiative petition, a copy thereof shall be transmitted to the Attorney General, who shall provide a title for the measure. Section 10 provides that as to cities and towns the duties required of the Attorney General by the act shall be performed by the city attorney as to municipal legislation. *Held*, that where the title to a bill proposing an amended charter was adequate, and the city at the time of the proceedings had no city attorney, failure to have the title prepared by the city attorney did not invalidate the election.—*Haines v. City of Forest Grove*, 443.

INSANE PERSONS.

INSANE PERSONS—VALIDITY OF MORTGAGE.

1. A mortgage by a grantor *non compos mentis*, without consideration, was void and not merely voidable.—*Bowman v. Wade*, 437.

INSANE PERSON—MORTGAGE—DISAFFIRMANCE—DUTY OF GUARDIAN.

2. The guardian of an insane person has no discretion to ratify a mortgage given by his ward, but is bound at his peril to disaffirm and avoid it.—*Bowman v. Wade*, 437.

INSANE PERSONS—AVOIDANCE OF TRANSFERS OF PERSONAL PROPERTY.

3. A person who, when insane, delivered personal property to another, who knew of the insanity shortly afterwards, may, on being restored to sanity, demand and receive a return of the property.—*Patton v. Washington*, 479.

INSTRUCTIONS TO JURIES.

INSTRUCTIONS—LARCENY—RECENT POSSESSION—"FOUND."

1. In a prosecution for larceny, an instruction as to defendant being found in the recent possession of stolen property is applicable, though the property is not found in defendant's possession, but in the possession of one to whom he had sold it, since the word "found," as used in instructions of this character, simply means "discovered," "traced to," or shown to have been in defendant's possession.—*State v. Minnick*, 86.

INSTRUCTIONS—LARCENY—"RECENT POSSESSION"—CONSTRUCTION.

2. The term "recent possession" as used in an instrument in a prosecution for larceny, is merely relative and depends on all the circumstances of the case, and whether it is sufficiently recent to justify drawing an inference, is usually a question of fact for the jury.—*State v. Minnick*, 86.

INSTRUCTIONS—TRIAL—WEIGHT OF EVIDENCE.

3. An instruction in a larceny prosecution *held* not erroneous as assuming a theft or as assuming that defendant's explanation of the recent possession of the stolen property was unreasonable.—*State v. Minnick*, 86.

INSTRUCTIONS—TRIAL—REQUESTS.

4. Requested instructions covered by the general charge are properly refused.—*State v. Minnick*, 86.

INSTRUCTIONS—CONSTRUCTION AS A WHOLE—"DELIBERATE"—PRESUMPTIONS AS TO MALICE.

5. Under Section 787, B. & C. Comp., providing that an intent to murder arises from the deliberate use of a deadly weapon, causing death, etc., and Section 1754, relating to the evidence of malice and premeditation in murder in the first degree, an instruction that the law conclusively presumes malice "from the deliberate and unlawful use of a deadly weapon," but does not conclusively presume that the killing is murder in any degree, followed by a charge that to constitute murder in the first degree there must be some other evidence than the mere fact of killing, sufficiently protects the rights of accused, relying on the defense of insanity, for the word "deliberate" means to weigh the motives for an act, its consequences, the nature of the crime, or the things connected with the intention, with a view to a decision thereon, and implies that accused was capable of the exercise of mental powers.—*State v. Jancig*, 361.

INSTRUCTIONS—NEGLIGENCE—ACCIDENTS AT CROSSINGS.

6. Where, in an action for the death of a traveler struck by a train at a crossing, the complaint alleged negligence in failing to have a full train crew, and not reducing the speed of the train when approaching the crossing, in not sounding the whistle and ringing the bell, and in not maintaining a watchman or automatic whistle to warn travelers, and the evidence wholly failed to establish negligence in failing to have a full train crew, an instruction that plaintiff need not prove that the railroad company was negligent in all of the particulars alleged, but only that it was negligent in some of them, was erroneous, because it impliedly submitted to the jury the alleged failure to have a full train crew.—*Russell v. Oregon R. & N. Co.* 128.

INSTRUCTIONS—WHEN MISLEADING—RAILROADS—CROSSING ACCIDENT.

7. An instruction, in an action for the death of a person struck by a train at a crossing, held properly refused because not couched in language sufficiently simple to enable the average juror to comprehend it.—*Russell v. Oregon R. & N. Co.* 128.

INSTRUCTIONS—TRIAL—FORM OF INSTRUCTIONS.

8. Unless an instruction is so definite as to enable a man of average intelligence to understand it, it ought to be refused as misleading.—*Russell v. Oregon R. & N. Co.* 128.

INSTRUCTIONS—EVIDENCE—RAILROADS—CROSSING ACCIDENT.

9. Where, in an action for the death of a traveler struck by a train at a railway crossing, the complaint alleged a negligent failure to have a full crew of train hands, but the evidence failed to support the allegation, an instruction, making it the duty of a railroad to man its trains with a sufficient crew, was misleading, because it could only refer to the want of a brakeman, established by the evidence.—*Russell v. Oregon R. & N. Co.* 128.

INSTRUCTIONS—MASTER AND SERVANT—INJURIES TO SERVANT.

10. Plaintiff was employed as a brakeman on a logging train by railroad company which operated logging trains on a certain branch of the road, and on a spur running from the branch, and plaintiff knew that it was customary to leave the switch from the spur to the branch open on to the spur after certain switching operations. Plaintiff was injured owing to the train on which he was riding, passing upon the open switch and colliding with a car at a time when he had reason to believe that the switch was open owing to the operations referred to having recently been completed, and the court charged in an action for the injury that, if the branch was in general use for passengers and freight service, it would constitute a main line, and was subject to the customs and rules of railroads as to main lines and spurs. Held, that the instruction was erroneous.—*Abel v. Coos Bay, Roseburg & E. R. & N. Co.* 188.

INSTRUCTIONS—INJURY TO SERVANT—REQUESTS—NECESSITY.

11. A party complaining of the instructions on the measure of damages, in an action for personal injuries, which correctly state the law as far as they go, must request additional instructions; and, in the absence of such request, he cannot urge omissions in the instructions as reversible error.—*Ferrari v. Beaver Hill Coal Co.* 210.

INSTRUCTIONS—HARMLESS ERROR—EVIDENCE.

12. Where the court, in an action by an infant for personal injuries, charged that no damages could be assessed for loss of time during minority, it would not be presumed that defendant was prejudiced by the testimony of plaintiff as to the length of time he was able to work after the injury and prior to the trial.—*Ferrari v. Beaver Hill Coal Co.* 210.

INSTRUCTIONS—IGNORING ISSUES.

13. The defendant, in an action on an express contract to pay rent, denied the contract, and alleged as a defense that a trustee in bankruptcy took possession of the premises under a decree against the plaintiff and leased them to defendant for a stipulated rental, which was the reasonable rental value of the premises, and paid into court the amount admitted to be due. Plaintiff's reply denied the new matter alleged in the answer, and averred that the decree had been reversed and the suit in which it was given dismissed. Held, that the issue made by the answer and reply was proper, and it was error to give an instruction that plaintiff's right to recover the reasonable rental value was not involved in the case.—*McGee v. Beckley*, 250.

INSTRUCTIONS—DISCRETION OF COURT—REQUEST FOR—INCLUDED IN GENERAL CHARGE.

14. A court is not bound to give, and ought not to give, an instruction, even though it may state the law correctly, which is not couched in language

sufficiently untechnical to be comprehended by the average juror, for by so doing the jury is confused rather than instructed.—*State v. Osborne*, 280.

INSTRUCTIONS—ROBBERY—TRIAL.

15. In a prosecution for robbery and assault with intent to kill if resisted, an instruction that if the jury find from the evidence beyond reasonable doubt that defendants, or either of them, are guilty of stealing from the person of the prosecuting witness the sum described in the indictment or some part thereof, but do not find that they or either of them assaulted said witness with intent, if resisted, to kill or wound said witness, then they should find the defendants or either of them guilty of the crime of larceny from the person, is not erroneous, as robbery is larceny aggravated by the circumstance that the property taken is taken from the person of another by violence or by putting him in fear, and the greater crime necessarily embraces the lesser offense of the same class.—*State v. Parr*, 316.

INSTRUCTIONS—REQUESTS—NECESSITY—ADDITIONAL INSTRUCTIONS.

16. In an action for commissions claimed to have been earned by purchasing land for defendant, an instruction that, if plaintiff exceeded his authority by making a larger first payment, or paying more per acre, than authorized, and defendant knew all the material facts in connection with plaintiff's acts, and accepted the benefits resulting therefrom, defendant by his conduct ratified plaintiff's unauthorized act, being the correct rule, if defendant desired an instruction as to what constituted the material facts as to plaintiff's acts in excess of his authority, he should have expressly called the court's attention to the omission.—*Mahon v. Rankin*, 328.

INSTRUCTIONS—AUTHORITY OF AGENT.

17. In an action for commissions for buying land for defendant, the court held to have properly instructed that any payments made by plaintiff to sellers in excess of the amount limited by defendant, was without authority.—*Mahon v. Rankin*, 328.

INSTRUCTIONS—HOMICIDE—DEFENSE OF RELATIVE.

18. Defendants, father and son, were indicted for murder. The son, who fired the fatal shot, testified that, after his father had held up his hands in token of submission, deceased and his relatives continued shooting into the house where the son found his father wounded and covered with blood, and, believing that his mother was also in the house, he picked up his father's rifle and fired the fatal shot, believing his own life and that of his mother to be in danger. Held, that the court's failure to charge on the son's right to protect his mother from danger from an alleged unjustifiable attack on the house by deceased and his brother, was error.—*State v. Walworth*, 371.

INSTRUCTIONS—THREATS—CRIMINAL LAW.

19. Defendants' requested instruction, that evidence of threats against decedent's family could not be considered as against one of the defendants not shown to have had any knowledge thereof, was properly refused, where it further stated that, if the jury were satisfied from the evidence as to which party commenced the affray, they could not consider the evidence of threats as against either defendant; the court not being authorized to charge that, if one item of relevant evidence satisfies the jury's mind on a given point, another item on the same point may be rejected.—*State v. Walworth*, 371.

INSTRUCTIONS—SELF DEFENSE.

20. An instruction that, unless defendant's fear of great bodily harm, or great danger to his life, was such that a reasonably prudent man would have entertained under all the circumstances, then his act in striking the fatal blow was not justifiable or excusable, properly stated the law.—*State v. Finch*, 482.

INSTRUCTIONS—POLLING JURY.

21. Where the bill of exceptions showed that all the jurors were present at the convening of court, and trial was not at any time allowed to proceed without all the jurors, the defendant and his counsel being present, and that all the jury were present when the instructions were given, an objection that the jury was not polled before the court gave its instructions was frivolous.—*State v. Finch*, 482.

INSTRUCTIONS—OBLIGATION OF JURY.

22. Under Section 16, Article I, Constitution of Oregon, providing that in criminal cases the jury shall determine the law and the facts under the direction of the court as to the law, the jury have not the moral right to disregard the directions of the court as to the law, and in determining the guilt or innocence of accused they should, as required by Section 1410, B. & O. Comp.,

receive the law from the court, though they have the power to disregard the instructions and acquit accused, who cannot, because of Section 12, be again placed in jeopardy for the same offense.—*State v. Daley*, 514.

INSTRUCTIONS—CRIMINAL LAW—TRIAL—PUNISHMENT.

23. The court, in charging that the jury in finding accused not guilty on the ground of insanity should state that fact in the verdict, properly refused to charge, in the language of Section 1424, B. & C. Comp., that the court on such a verdict must commit accused to a lunatic asylum, where it deems his being at large dangerous to the public safety; whether accused should be so confined being for the court alone.—*State v. Daley*, 514.

INSTRUCTIONS—CRIMINAL LAW—TRIAL—PUNISHMENT.

24. Where the jury are not authorized by statute to prescribe the punishment, it is not error to refuse to instruct what the penalty may be if accused is found guilty as charged or of a lesser offense included in the indictment.—*State v. Daley*, 514.

INSTRUCTIONS—APPEAL—EXCEPTIONS BELOW.

25. Any error of the court in failing in its duty, under Section 16, Article I, Constitution of Oregon, to instruct, without request, on all questions of law arising in the case, is unavailable on appeal, unless exception was reserved.—*State v. Daley*, 514.

INTOXICATING LIQUORS.

INTOXICATING LIQUORS—LOCAL OPTION—ELECTIONS—APPLICATION AND PROCEEDINGS THEREON—"LEGAL VOTERS."

1. Laws 1906, p. 41, provides that whenever a petition therefor, signed by not less than 10 per cent of the "registered voters" of any county, shall be filed with the county clerk, the county court shall order an election to determine whether the sale of intoxicating liquors shall be prohibited in such county, and that, in determining whether any such petition contains the requisite percentage of "legal voters," said percentage shall be based on the total vote in such county for Justice of the Supreme Court at the last preceding general election, provided that in no event shall more than five hundred petitioners who are legal voters be necessary upon any such petition, and "the county clerk shall, upon receipt of such petition, immediately file the same, and shall compare the signatures of the electors signing the same with their signatures on the registration books of the election then pending, or, if none pending, with the signatures on the registration books and blanks on file in his office for the preceding general election." *Held*, that the phrase "legal voters" as used in the law is a synonym for "registered voters," and that no qualified elector is a competent petitioner for a local option election unless his signature appears on the registration books, the privilege of signing such a petition not being a right of franchise in which all the electors enumerated in Section 2, Article II, Constitution of Oregon, may participate, but whether there is a sufficient number of signers is to be determined by comparing such number with the number who last voted for Justice, and the number of registered voters in a district is only important for the purpose of comparing the signatures of the petitioners with the signatures on the registration books.—*Roesch v. Henry*, 230

INTOXICATING LIQUORS—LOCAL OPTION—ELECTION—ORDER—"LEGAL VOTERS"—"REGISTERED VOTERS."

2. A county court, in considering a petition for an election to determine whether the sale of intoxicating liquors shall be prohibited in the county, rectified in their order that the matter came before them on the petition of "legal voters" of the county, and that, "it appearing to the court that said petition is signed by more than 10 per cent of the qualified electors, * * and has been properly compared and certified to be genuine and is in all respects in due form of law, it is therefore considered and ordered by the court that the prayer of said petition be and the same is hereby granted." *Held*, that the terms "legal voters" and "qualified electors" as used in the order are not equivalent to "registered voters" as used in Laws 1906, p. 41, providing for the calling of an election to determine whether the sale of intoxicating liquors shall be prohibited on petition of 10 per cent of the "registered voters."—*Roesch v. Henry*, 230.

INTOXICATING LIQUORS—LOCAL OPTION—ELECTIONS—DECLARATION OF RESULT—INJUNCTION.

3. A complaint, in proceedings to restrain the county judge and commissioners of a county from declaring the result of an election to determine whether the sale of intoxicating liquors should be prohibited, alleged that the county court, in making the order for such election, acted without jurisdic-

tion, in that the said petition did not contain the requisite number of names of persons who are legal voters in the county. The county court in calling the election acted under Laws 1905, p. 41, providing for calling such an election on a petition signed by not less than 10 per cent of the "registered voters" of a county, but that in no event shall it be necessary to secure more than five hundred petitioners "who are legal voters." *Held*, that the allegation of the complaint was insufficient to contest the validity of the order, because attention was not specifically called to the class of persons who were qualified petitioners.—*Roesch v. Henry*, 230.

INTOXICATING LIQUORS—LOCAL OPTION—NOTICE OF ELECTION.

4. A notice of an election, to be held to determine whether the sale of intoxicating liquors should be prohibited in the county which follows the form prescribed by the statute (Laws 1905, p. 45, § 7), is sufficient, although the signature of the county clerk was printed and his official seal was not attached.—*Roesch v. Henry*, 230.

INTOXICATING LIQUORS—LOCAL OPTION—NOTICE OF ELECTION—WHO MAY POST.

5. Laws 1905, p. 45, § 7, makes it the duty of the sheriff, before the holding of any local option election, to post the notices which have been delivered to him by the county clerk. The notices prescribed by said Section 7 are not to be issued in the name of the State, nor directed to any person. *Held*, that the election was not affected by the posting of the notices by private persons.—*Roesch v. Henry*, 230.

INTOXICATING LIQUORS—LOCAL OPTION—NOTICE OF ELECTION.

6. Laws 1905, p. 44, § 4, provides that no person shall be qualified to vote at any local option election who would not be qualified to vote at that election for precinct and county officers in that precinct in which he offers to vote, and Section 2776, B. & C. Comp., provides that all qualified electors shall vote in the election precinct in the county where they may reside for county officers. In a local option election in a county, there were 1,995 votes cast in favor of prohibition, and 1,805 against it. In a precinct in which the notices of election were not posted as prescribed by law, the number of registered voters were thirty-eight, and at the election therein nine votes were cast in favor of prohibition and twenty-two cast against it. The greatest number of votes cast for any officer in the county at the election in which the question of local option was passed upon was 3,437, or 852 more than were registered. *Held*, that the failure to properly post the notices in that precinct did not invalidate the election, as the number of votes in that precinct could not affect the general result.—*Roesch v. Henry*, 230.

INTOXICATING LIQUORS—LOCAL OPTION LAW—REPEAL BY CITY CHARTER.

7. Section 18, Act February 21, 1905 (Sp. Laws 1905, p. 137), incorporating the City of Vale and repealing the act incorporating the town, gave the council power to "license, tax, regulate, or prohibit barrooms, drinking shops, saloons, tippling houses, * * * and all other places where spirituous, malt, or vinous liquors are sold," and also prohibited the issuance of any license for any less amount than that required by the State law. This section practically re-enacted Section 14 of the original town charter with some additions. No reference, however, was made in the new charter to the local option law. *Held*, that this did not repeal the local option law as to such city.—*State ex rel. Malheur County Court*, 255.

IRRIGATION.

IRRIGATION—EVIDENCE—FINDINGS.

1. In a suit to enjoin defendant from interfering with the flow of water into complainant's irrigation ditch, evidence *held* to warrant a finding that defendant had unlawfully diverted the water from the main ditch, and that this was the cause of plaintiff's water shortage and the impairment of his crops.—*Simpson v. Harrah*, 448.

IRRIGATION—RIGHTS TO WATER—PLEADING.

2. Where, in a suit to enjoin defendant from interfering with the flow of water in plaintiffs' ditch, defendant by answer made no claim to any water nor title to any land, and plaintiffs claimed no definite quantity of water, and did not prove the amount to which they were entitled, a decree attempting to establish plaintiffs' title to a definite amount of water, and to settle the rights of the parties as to the water flowing in the main ditch, was erroneous.—*Simpson v. Harrah*, 448.

IRRIGATION—REHEARING—GROUNDS—MISTRIAL OF ISSUES.

3. Where the complaint alleged that defendant had been, during the season of 1907, and then was, wrongfully diverting water from the main ditch described, which the evidence showed, as well as that the water did not reach the division box, a contention made, as a ground for rehearing, that the controversy was not over the water which flowed into the main ditch, but over that at the division box, was untenable.—*Simpson v. Harrah*, 448.

JUDGMENT.

JUDGMENT—OPENING AND SETTING ASIDE IN JUSTICE COURT.

1. The specifications by Sections 108, 2287, B. & C. Comp., of mistake, inadvertence, surprise, or excusable neglect as grounds for opening a judgment in a justice's court exclude all others, and, though pursuant to section 924 a justice's court is always open for the transaction of business, it is powerless to set aside a valid judgment except for the reasons specified.—*White v. Brown*, 7.

JUDGMENTS APPEALABLE—FINALITY.

2. A judgment in condemnation proceedings that the land sought to be taken is appropriated and taken from defendant by plaintiff on the deposit by plaintiff of a specified sum, and without reserving anything for the court's further determination, is a final judgment, and appealable, though plaintiff did not make any deposit.—*Oregon R. & N. Co. v. Eastlack*, 196.

JUDGMENTS APPEALABLE—VOID JUDGMENTS.

3. A void judgment, entered at a time when the court is without jurisdiction to award it, is reviewable on appeal.—*Oregon R. & N. Co. v. Eastlack*, 196.

JUDGMENT—DEFAULT JUDGMENT—VACATION—GROUNDS.

4. Where substituted summons was had on defendant, a minor 19 years of age, by serving same on his mother, and thereafter the mother was appointed guardian *ad litem*, and served with summons, and subsequently, no appearance having been made, another guardian *ad litem* was appointed and appeared in open court announcing that he had no defense and declining to plead, and it did not appear that defendant took any interest in the matter, though counsel had been consulted, the court did not abuse its discretion in refusing to open judgment against him.—*Anderson v. McClellan*, 206.

JUDGMENT—DEFAULT JUDGMENT—OPENING DEFAULT—DISCRETION OF COURT.

5. The granting or refusing the motion to open a default is a matter resting in the sound discretion of the court, and its exercise will not be disturbed, except for abuse of that discretion.—*Anderson v. McClellan*, 206.

JUDGMENT—ASSIGNMENTS—EFFECT AS TRANSFERRING PERSONAL LIABILITY OF JUDGMENT DEBTOR.

6. An assignment of a part of a judgment adjudicating the personal liability of the judgment debtor, transfers to the assignee a portion of such personal liability.—*Alexander v. Munroe*, 500.

JUDGMENT—LIEN—REMEDIES AFTER TERMINATION.

7. A judgment creditor assigned a half interest in the judgment and in real estate sought to be subjected to the payment of the judgment by a pending creditor's suit. Thereafter the judgment creditor obtained a decree subjecting the real estate to the judgment, and thereafter he and the judgment debtor, in fraud of the assignee, settled the litigation. The assignee, before the filing of the cancellation of the judgment and during the life of the judgment, sued to enjoin the filing thereof and to secure his interest in the real estate. Pending that suit, a suit to foreclose a mortgage on the real estate was brought, and the assignee filed a cross-bill seeking to enforce his interests under the assignment. *Held*, that the right of the assignee to enforce his portion of the judgment as a lien on the land was not affected by the fact that execution had not issued on the judgment within ten years from the rendition thereof at the time of the institution of the foreclosure suit; but his rights depended on a new decree, which must be rendered pursuant to his cross-bill, reserving to him his rights as they existed at the time of the fraudulent settlement.—*Alexander v. Munroe*, 500.

JUDGMENT—LIEN—COMMENCEMENT.

8. Where a judgment creditor obtained a decree against the judgment debtor and his grantees, setting aside deeds of lands and subjecting the same to the payment of the judgment, the lien of the decree ran from the time it became final, and lapse of time from the entry of the judgment did not operate to cancel it.—*Alexander v. Munroe*, 500.

JUDGMENT—PARTIAL ASSIGNMENT—EFFECT.

9. A partial assignment of a judgment without the consent of the judgment debtor is not enforceable at law, but operates as an equitable assignment, and the judgment debtor, having knowledge of the assignment, cannot settle with the judgment creditor to the prejudice of the assignee.—*Alexander v. Munroe*, 500.

JUDGMENT—PAYMENT—PRESUMPTION—EQUITABLE EXECUTION.

10. A creditors' suit, commenced during the life of a judgment, to subject property to the payment thereof, not available by execution at law, operates as an equitable execution sufficient to suspend limitations under Section 241, B. & C. Comp., providing that, after the lapse of ten years without an execution, a judgment shall be conclusively presumed to be paid.—*Alexander Munroe*, 500.

JUDGMENT—CONCLUSIVENESS—FINDINGS OF FACT.

11. Findings of fact leading to a decree, affirmed by the Supreme Court, in a prior action between the parties, cannot be considered in a subsequent proceeding, so far as they are in any manner inconsistent with the decree affirmed.—*Taylor v. Taylor*, 560.

JUDGMENT—PRIOR ADJUDICATION—DETERMINATION OF ISSUES—OPINION.

12. Where a decree, affirmed on a prior appeal, is ambiguous, or fails to show on which of several issues it is founded, the opinion of the Supreme Court may be examined, to determine the point actually decided.—*Taylor v. Taylor*, 560.

JUDGMENT—RES JUDICATA—QUESTIONS CONCLUDED.

13. A judgment or decree is conclusive as to every matter actually litigated, and, with certain exceptions, as to every matter which might have been litigated, or decided as an incident thereof.—*Taylor v. Taylor*, 560.

JUDGMENT—PAROL EVIDENCE—CONTRADICTION OF RECORD.

14. Extrinsic proof and parol evidence is inadmissible to explain what was formerly adjudicated in a prior decree respecting matters not there in issue.—*Taylor v. Taylor*, 560.

JUDICIAL NOTICE.**JUDICIAL NOTICE—CHARTERS OF MUNICIPAL CORPORATIONS.**

A charter of a city is a public law of the state of which the courts take judicial notice.—*Taylor v. McColloch, Mayor*, 505.

JURISDICTION.**JURISDICTION—ACTION AGAINST FOREIGN CORPORATION.**

1. A foreign corporation may be sued in the State on any transitory cause of action, no matter where it arose.—*Cunningham v. Klamath Lake R. Co.* 13.

JURISDICTION—STATUTES—FOREIGN CORPORATIONS.

2. The requirement of Laws 1903, p. 39, as to foreign corporations filing statements with the Secretary of State, held to afford evidence that a foreign corporation is doing business in the State, but does not fix the place where actions against it may be maintained.—*Cunningham v. Klamath Lake R. Co.* 13.

JURISDICTION—NECESSARY AVERMENT IN COMPLAINT.

3. To secure jurisdiction of the person of a defendant foreign corporation, held that it was not indispensable that the complaint should aver that it was engaged in business in the State.—*Multnomah Lumber Co. v. Weston Basket Co.* 22.

JURISDICTION—HOW ACQUIRED—APPEARANCE BY ATTORNEY.

4. Jurisdiction to render a judgment against a foreign corporation for failure to appear and answer may rest on its voluntary appearance, equivalent to personal service of the summons, as expressly provided by Section 63, B. & O. Comp.—*Multnomah Lumber Co. v. Weston Basket Co.* 22.

JURISDICTION—FOREIGN CORPORATION—ACTION AGAINST.

5. In absence of a voluntary appearance, no foreign corporation is subject to the jurisdiction of the State courts unless engaged in business in the State when sued.—*Multnomah Lumber Co. v. Weston Basket Co.* 22.

JURISDICTION—HIGHWAYS—VACATION—PROCEEDINGS—CERTIORARI.

6. When attention is called to a lack of jurisdiction, the duty devolves upon the court to set aside the proceedings and purge the record of informal-

ties, though the defect has not been challenged in a formal way, and hence upon writ of review in the circuit court to review proceedings in the county court to vacate a highway, where it appeared that the county court had not acquired jurisdiction, its order vacating the road was properly set aside, though its power to hear and determine the matter had not been formally challenged.—*Rynearson v. Union County*, 181.

JURISDICTION, WANT OF—DUTY OF COURT.

7. At any stage of the proceeding, when want of jurisdiction is manifest, it is the duty of the court and on its own motion to refuse to proceed further.—*Rynearson v. Union County*, 181.

JURISDICTION—LOCAL OPTION—NOTICE OF ELECTION.

8. Jurisdiction comes, in the first instance, from the petition and order of the county court submitting the question of prohibition to a vote, and not from the notice, which is a mere incident, and therefore a substantial compliance with the statute is all that is required.—*Roesch v. Henry*, 230.

JUSTICES OF THE PEACE.

JUSTICES OF THE PEACE—PROCEEDINGS TO PROCURE WRIT—SUFFICIENCY OF PETITION.

1. Section 506, B. & C. Comp., provides that the writ of review shall describe with convenient certainty the decision or determination sought to be reviewed, setting forth the errors alleged to have been committed therein. Section 507 requires a petition for a writ of review to state such facts as from an inspection of the averments would primarily show that the inferior court, officer, or tribunal appears to have employed its functions erroneously in the exercise of judicial authority, or to have exceeded it or his jurisdiction. A petition to review the action of a justice of the peace in vacating a judgment on the ground that he was without jurisdiction set forth docket entries showing that an action to recover money was begun by plaintiff against defendant in a certain justice's district, that the place of trial was thereafter changed to a justice court of a certain other precinct, where, on a specified date, were filed a transcript and original papers consisting of the complaint, answer, reply, motion, and affidavit for a change of venue; that on a subsequent date the cause was tried in that court, and judgment rendered for plaintiff, and that thereafter the justice of such precinct, on defendant's motion, vacated the judgment on the ground that his court was without jurisdiction of the action, and, in referring to his action, stated that he "erred in vacating and setting aside said judgment" and "exceeded his jurisdiction in making and entering an order vacating and setting aside said judgment," and "that the making and entering of said order is a material injury to a substantial right of the plaintiff." Held, that the petition sufficiently assigned the errors complained of.—*White v. Brown*, 7.

JUSTICES OF THE PEACE—JUDGMENTS—VACATION.

2. The specifications by Sections 103, 2237, B. & C. Comp., of mistake, inadvertence, surprise, or excusable neglect, as grounds for opening a judgment in a justice's court, exclude all others, and, though pursuant to Section 924 a justice's court is always open for the transaction of business, it is powerless to set aside a valid judgment except for the reasons specified.—*White v. Brown*, 7.

LARCENY.

LARCENY—INDICTMENT AND INFORMATION—SUFFICIENCY.

1. Under Section 1303, B. & C. Comp., providing that an indictment is definite enough if the facts are so stated as to enable a person of common understanding to know what is intended, an indictment charging that defendant "took, carried, stole, led and drove away," two heifers of the value of \$30, contrary to the statutes, is sufficient to charge simple larceny without the allegation that the taking was felonious.—*State v. Minnick*, 86.

LARCENY—INDICTMENT—GRAND OR SIMPLE LARCENY.

2. Under Section 1301, B. & C. Comp., relating to grand larceny, and providing that any person committing the crime of larceny by stealing any "cow or calf" shall be punished, an indictment alleging that defendant took, carried, stole, led, and drove away, two heifers of the value of \$30, charges petty and not grand larceny, since the word "feloniously" is not used; "heifer" is not mentioned in the statute, and it is unnecessary, in order to charge grand larceny, to allege the value of the animal.—*State v. Minnick*, 86.

LARCENY—RECENT POSSESSION—INSTRUCTIONS—"FOUND."

3. In a prosecution for larceny, an instruction as to defendant being found in the recent possession of stolen property is applicable, though the property is not found in defendant's possession, but in the possession of one to whom he had sold it, since the word "found," as used in instructions of this character, simply means "discovered," "traced to," or shown to have been in defendant's possession.—*State v. Minnick*, 88.

LARCENY—RECENT POSSESSION—INSTRUCTIONS—CONSTRUCTION.

4. The term "recent possession," as used in an instruction in a prosecution for larceny, as to the "recent possession" of stolen property, is merely relative and depends on all circumstances of the case, and whether it is sufficiently recent to justify drawing an inference is usually a question of fact for the jury.—*State v. Minnick*, 88.

LARCENY—ACCOMPLICES—CRIMINAL LAW.

5. In view of the statute by its terms making larceny and the receiving of stolen goods distinct offenses, where defendant had nothing to do with the unlawful taking of a horse, his subsequent purchase of the animal did not make him an accomplice, even if he had knowledge of the previous theft.—*State v. Moxley*, 408.

LARCENY—SUFFICIENCY OF EVIDENCE.

6. Evidence held sufficient to justify a conviction of general larceny of a horse, and not of a larceny by altering a brand.—*State v. Moxley*, 408.

LIEN.**LIEN—REMEDIES AFTER TERMINATION.**

1. A judgment creditor assigned a half interest in the judgment and in real estate sought to be subjected to the payment of the judgment by a pending creditor's suit. Thereafter the judgment creditor obtained a decree subjecting the real estate to the judgment, and thereafter he and the judgment debtor, in fraud of the assignee, settled the litigation. The assignee, before the filing of the cancellation of the judgment and during the life of the judgment, sued to enjoin the filing thereof and to secure his interest in the real estate. Pending that suit, a suit to foreclose a mortgage on the real estate was brought, and the assignee filed a cross-bill seeking to enforce his interests under the assignment. Held, that the right of the assignee to enforce his portion of the judgment as a lien on the land was not affected by the fact that execution had not issued on the judgment within ten years from the rendition thereof at the time of the institution of the foreclosure suit; but his rights depended on a new decree, which must be rendered pursuant to his cross-bill, reserving to him his rights as they existed at the time of the fraudulent settlement.—*Alexander v. Munroe*, 500.

LIEN—COMMENCEMENT.

2. Where a judgment creditor obtained a decree against the judgment debtor and his grantees, setting aside deeds of lands and subjecting the same to the payment of the judgment, the lien of the decree ran from the time it became final, and lapse of time from the entry of the judgment did not operate to cancel it.—*Alexander v. Munroe*, 500.

LIMITATIONS OF ACTIONS.**LIMITATION OF ACTIONS—PLEADING AS DEFENSE—NECESSITY.**

The defense of limitations, if not taken by demurrer or answer, is waived.—*Alexander v. Munroe*, 500.

LIS PENDENS.**LIS PENDENS—SUIT BY ASSIGNEE OF JUDGMENT—EFFECT.**

A suit by an assignee of a half interest in a judgment and in real estate sought to be subjected to the payment of the judgment in a pending creditor's suit, to protect his rights as against a fraudulent settlement entered into between the assignor and the judgment debtor stipulating for the cancellation of the original judgment and of the decree in the creditor's suit subjecting real estate to the payment of the original judgment, brought within the life of the original judgment, is *lis pendens* and keeps alive the equitable lien, and a decree establishing his rights may be rendered after the judgment has ceased to be a lien on the real estate.—*Alexander v. Munroe*, 500.

LOCAL OPTION.

Relating to Elections, Application and Proceedings Thereon. See INTOXICATING LIQUORS.

LOGS AND LOGGING.

LOGS AND LOGGING—LIENS—CONVERSION OF LOGS—ACTIONS—PLEADING.

1. Under Section 87, B. & C. Comp., providing that in pleading a judgment facts conferring jurisdiction need not be stated, a complaint based on Section 5692, making a person rendering impossible of identification logs on which there is a lien liable to the lienholder, which alleges that the lien on the logs was duly foreclosed in a suit instituted for that purpose, need not allege the facts showing the validity of the lien; the validity having been presumably established.—*Willett v. Kinney*, 594.

LOGS AND LOGGING—LIENS—CONVERSION OF LOGS—ACTIONS—PLEADING.

2. A complaint based on Section 5692, B. & C. Comp., making a person who, without the consent of the lien claimant, renders impossible of identification any logs on which there is a lien liable to the lienholder, which alleges that defendants, fraudulently conniving, conspiring, and confederating to cheat and defraud plaintiff out of his labor and lien security, destroyed and removed all of the logs and rendered the same impossible of identification, and appropriated the same to their own use, sufficiently negatives the consent of plaintiff to the removal as against a demurrer.—*Willett v. Kinney*, 594.

LOGS AND LOGGING—LIENS ON LOGS.

3. Under Section 5692, B. & C. Comp., making one rendering impossible of identification logs on which there is a lien liable to the lienholder for damages to the extent of the sum secured, a defendant appropriating to his own use logs subject to a lien in favor of another, and the value of the logs exceed or equal the value of the lien, is liable to the lienholder.—*Willett v. Kinney*, 594.

MANDAMUS.

MANDAMUS—SCOPE OF REMEDY.

1. If the making of an order is a mere ministerial act, involving no exercise of judgment or judicial power, mandamus is the proper remedy to compel it; but where an act is judicial or involves the exercise of judgment or discretion, and such judgment has been exercised, mandamus will not lie to compel amendment or correction thereof, though the action was erroneous.—*State ex rel. v. Malheur County Court*, 255.

MANDAMUS—ACTING IN JUDICIAL CAPACITY—ORDER OF PROHIBITION—COMPELLING AMENDMENT.

2. The county court, in including a city in an order of prohibition where it was claimed to be exempt by its charter from the operation of the local option law, acted in a judicial capacity, and the circuit court cannot compel it by mandamus to amend its order in this respect.—*State ex rel. v. Malheur County Court*, 255.

MANDAMUS—SUBJECTS OF RELIEF—COURTS AND JUDICIAL OFFICERS—DECLARING RESULTS OF ELECTION.

3. Session Laws 1905, p. 46, § 7, requiring the clerk and sheriff, respectively, to issue and post notices of special local option elections, and to enter of record their compliance with such duty, and provides that such record shall be *prima facie* evidence that all provisions of the law have been complied with. Section 10 requires the clerk to call to his assistance two justices of the peace, and make an abstract of the vote of such election for the information of the county court, and on the eleventh day after the election the court is required to meet and immediately make an order of prohibition, if a majority of the votes in the county as a whole are for prohibition. *Held* that, after the court had acted upon the evidence which the law required to be furnished it, mandamus will not lie to compel the court to make an order excepting a certain city in the county from the operation of the order of prohibition made by it; such order not being among the duties of the court under the statutes.—*State ex rel. v. Malheur County Court*, 255.

MASTER AND SERVANT.

MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE OF SERVANT.

1. Plaintiff was an old and experienced workman, whose work in part was cleaning locomotive boilers, both in and out of repair, so that he could not fail to know that there was a possibility that an engine on which he was required to work would be undergoing repairs. Before beginning on an

engine he consulted the engineer's work report, which contained items of repairs to be made thereon, and though the item requiring the boiler to be cleaned was first on the report, and he did not read further, he could not help seeing that other items thereon called for other work on the engine, so that he was put upon notice that other work was to be done. Before he began work the jacket and hand rail on the side of the engine had been removed by other workmen, and plaintiff, without inspecting the boiler to avoid danger, climbed onto the running board with a hose, and, losing his balance, fell off, because there was no hand rail to hold to, and was injured. *Held*, that he was negligent, and could not recover.—*Brasel v. Oregon R. & N. Co.* 157.

MASTER AND SERVANT—ASSUMPTION OF RISK—NEGLIGENCE OF FELLOW SERVANT.

2. Plaintiff and the other workmen working on the engine being fellow servants, he assumed the risk of the other's negligence, if any, and the master's foreman owed no duty to caution each one to beware of the operations of the others.—*Brasel v. Oregon R. & N. Co.* 157.

MASTER AND SERVANT—ASSUMPTION OF RISK—NECESSARY INCIDENT OF EMPLOYMENT.

3. The removal of the hand rail being a necessary part of the labor to be done on the engine, the risk of injury from its absence was a risk assumed by plaintiff.—*Brasel v. Oregon R. & N. Co.* 157.

MASTER AND SERVANT—INJURY TO SERVANT—QUESTION FOR JURY.

4. In an action for injuries to a brakeman owing to the train on which he was riding having passed through an open switch and collided with a car, the question whether he was negligent in riding on a step of the tender, *held* one for the jury.—*Abel v. Coos Bay, Roseburg & E. R. & N. Co.* 188.

MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE—QUESTION FOR JURY.

5. Where, in an action for injuries to a brakeman on a logging train owing to the train having passed on an open switch and collided with a car, the evidence showed that it was customary for the switch to be left open after certain switching operations, which had recently been completed when the accident occurred, and that plaintiff had reason to believe that it was open, the condition of the switch did not constitute negligence. The question whether it was the proximate cause of the injury, *held* one for the jury.—*Abel v. Coos Bay, Roseburg & E. R. & N. Co.* 188.

MASTER AND SERVANT—INJURY TO SERVANT—QUESTION FOR JURY.

6. In an action for injuries to a brakeman owing to the train on which he was riding having passed upon an open switch and collided with a car, the question whether defendant was negligent in leaving the car on the track, *held* for the jury.—*Abel v. Coos Bay, Roseburg & E. R. & N. Co.* 188.

MASTER AND SERVANT—INJURIES TO SERVANT—INSTRUCTIONS.

7. Plaintiff was employed as a brakeman on a logging train by railroad company which operated logging trains on a certain branch of the road, and on a spur running from the branch, and plaintiff knew that it was customary to leave the switch from the spur to the branch open on to the spur after certain switching operations. Plaintiff was injured owing to the train on which he was riding passing upon the open switch and colliding with a car at a time when he had reason to believe that the switch was open owing to the operations referred to having recently been completed, and the court charged in an action for the injury that, if the branch was in general use for passengers and freight service, it would constitute a main line, and was subject to the customs and rules of railroads as to main lines and spurs. *Held*, that the instruction was erroneous.—*Abel v. Coos Bay, Roseburg & E. R. & N. Co.* 188.

MASTER AND SERVANT—INJURIES TO SERVANT—PROXIMATE CAUSE—EVIDENCE.

8. A servant suing for a personal injury, who introduces evidence of the defective condition of an appliance, as alleged in the complaint, must show that the injury might have been avoided if the appliance had been in repair.—*Ferrari v. Beaver Hill Coal Co.* 210.

MASTER AND SERVANT—INJURY TO SERVANT—EVIDENCE OF SUBSEQUENT CONDUCT.

9. In an action for injuries to a coal miner while working on an incline, permitting the engineer, who had made a plat offered in evidence, to testify on cross-examination that guard rails had been placed on the incline since the accident, was not erroneous, where the court charged that the jury should not consider the evidence as proof of negligence.—*Ferrari v. Beaver Hill Coal Co.* 210.

MASTER AND SERVANT—OBLIGATION OF MASTER.

10. A master must point out the unusual and extraordinary risks of the employment, and call the attention of the servant to them, and warn him of the danger.—*Ferrari v. Beaver Hill Coal Co.* 210.

MASTER AND SERVANT—ASSUMPTION OF RISK—INJURY TO SERVANT.

11. An infant servant assumes the ordinary hazards and risks of his employment that he, through his intelligence, knows, or should know and appreciate, and he assumes the dangers that are so open and obvious that one of his age, capacity, and experience would, in the exercise of ordinary care, know and appreciate.—*Ferrari v. Beaver Hill Coal Co.* 210.

MASTER AND SERVANT—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

12. That a servant suing for personal injuries is immature in years and inexperienced in the work, is important in determining the question of his contributory negligence.—*Ferrari v. Beaver Hill Coal Co.* 210.

MASTER AND SERVANT—INFANT SERVANTS—OBLIGATION OF MASTER.

13. A master employing an infant inexperienced in the work must give him sufficient notice of the dangers incident to and attending the employment.—*Ferrari v. Beaver Hill Coal Co.* 210.

MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—FAILURE TO ADOPT RULES.

14. The question whether the master was at fault in failing to adopt suitable rules is not for the jury, unless there is something in the testimony from which the inference may be drawn that it was practicable to have provided against the occurrence of the accident complained of by such a rule.—*Ferrari v. Beaver Hill Coal Co.* 210.

MASTER AND SERVANT—INJURY TO SERVANT—FAILURE TO ADOPT RULES—NEGLIGENCE.

15. Whether a master was negligent in omitting to adopt suitable rules for the guidance of the servants, held, under the evidence, for the jury.—*Ferrari v. Beaver Hill Coal Co.* 210.

MASTER AND SERVANT—INJURY TO SERVANT—ASSUMPTION OF RISKS—QUESTION FOR JURY.

16. Whether an infant coal miner assumed the risks incident to his employment, including the taking of defective cars to a shop, held, under the evidence, for the jury.—*Ferrari v. Beaver Hill Coal Co.* 210.

MASTER AND SERVANT—INJURIES TO SERVANT—EMPLOYER'S LIABILITY ACT—PLEADING.

17. To entitle an injured employee to recover under Laws 1907, p. 802, requiring safeguarding of dangerous machinery in mills and factories, he must plead noncompliance by the master with the terms of the act; that the injury was the result of such noncompliance, and that plaintiff had given notice to the employer within six months, of the time, place, and cause of the injury.—*Rogers v. Portland Lumber Co.* 387.

MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE OF MASTER—QUESTION FOR JURY.

18. In an action for injuries to a servant by the sudden starting of machinery, evidence held to require submission of the question whether the injury was the result of defendant's negligence, to the jury.—*Rogers v. Portland Lumber Co.* 387.

MASTER AND SERVANT—INJURIES TO SERVANT—SAFEGUARDING GEARING—QUESTION FOR JURY.

19. Where a machine, by which plaintiff was injured while assisting to repair it, was liable to start automatically, whether it was a safe place for repairers without safeguarding the gearing, was for the jury.—*Rogers v. Portland Lumber Co.* 387.

MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

20. Where a servant was injured by the alleged automatic starting of a machine as he was assisting in repairing the same, and he had no notice that it was liable to start automatically, he was not negligent as a matter of law in failing to take a safe position, and the questions of assumed risk and contributory negligence were for the jury.—*Rogers v. Portland Lumber Co.* 387.

MASTER AND SERVANT—INJURIES TO SERVANT—DANGEROUS MACHINERY—MASTER'S DUTY.

21. Where a servant was injured by the automatic starting of certain gearing, while he was repairing a chain connected therewith, and defendant's foreman knew that it was liable to so start, it was defendant's duty to take some precaution to prevent such result.—*Rogers v. Portland Lumber Co.* 387.

MASTER AND SERVANT—INJURIES TO SERVANT—KNOWLEDGE OF FOREMAN—DEFECTIVE MACHINERY—QUESTION FOR JURY.

22. Knowledge of defendant's foreman that certain machinery in its mill was liable to start automatically was the knowledge of defendant, and whether it was negligence for defendant to leave the gearing unguarded, was a question for the jury.—*Rogers v. Portland Lumber Co.* 387.

MASTER AND SERVANT—INJURIES TO SERVANT—CAUSE OF ACCIDENT.

23. Where a servant was injured by the sudden starting of machinery while he was repairing it, and it was shown that the machinery was liable to start automatically by the vibration of other machinery in motion, plaintiff's failure to allege or prove directly what caused the machinery to start was not fatal to a recovery.—*Rogers v. Portland Lumber Co.* 387.

MASTER AND SERVANT—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE—NEGLIGENCE.

24. Evidence, in an action against a master to recover for injuries to a servant, held to make the question of defendant's negligence and whether plaintiff assumed the risk incident to machinery around which he was working, for the injury.—*Bigelow v. Columbia Gold Mining Co.* 451.

MASTER AND SERVANT—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE—CONTRIBUTORY NEGLIGENCE.

25. Evidence, in an action against a master for injuries to a servant, held sufficient to make the question of contributory negligence for the jury.—*Bigelow v. Columbia Gold Mining Co.* 451.

MASTER AND SERVANT—"RESPONDEAT SUPERIOR."

26. The maxim of "*respondet superior*" means that a master is responsible for the acts of his servants where the particular act causing the injury is within the scope, and is done in the exercise, of the servant's delegated authority. The test of the existence of the relation of master and servant is found in the exercise of authority in appointing the servant, in directing his acts, in receiving the benefits of his acts, and in reserving the power of dismissal.—*Fetting v. Winch*, 600.

MECHANICS' LIENS.

MECHANICS' LIENS—AGREEMENT OR CONSENT OF OWNER.

1. Under Section 5640, B. & C. Comp., providing that every contractor shall have a lien for the work done in the construction of the building at the instance of the owner or his agent and that every architect having charge of the construction of a building shall be deemed the agent of the owner, a contractor claiming a lien must show a contract with the owner, or with his authorized agent, and a contractor relying on a contract with an architect employed only to make plans, under an agreement for compensation if the owner proceeds with the construction of the building, is not entitled to a lien, where the owner had decided not to erect the building.—*Litherland v. Cohn Real Estate Co.* 71.

MECHANICS' LIENS—EVIDENCE TO ESTABLISH—SUFFICIENCY.

2. One seeking to establish a lien for materials and labor furnished to a contractor, must make a definite showing as to value in order to prevail.—*Laughtin v. Connors*, 184.

MECHANICS' LIENS—EVIDENCE—SUFFICIENCY.

3. Evidence examined, and held insufficient to establish a lien for any definite amount for labor and materials furnished a contractor.—*Laughtin v. Connors*, 184.

MORTGAGES.

MORTGAGE—INSANE PERSONS—VALIDITY OF MORTGAGE.

1. A mortgage by a grantor *non compos mentis*, without consideration, was void and not merely voidable.—*Bowman v. Wade*, 317.

MORTGAGE BY NON COMPOS MENTIS—ATTACHMENT—"SECURED CLAIM."

2. Where plaintiff's debt was secured by the mortgage of a person *non compos mentis*, it was not a "secured claim" within the statute authorizing attachment (Section 396, B. & C. Comp.), providing for attachment in an action on a contract, express or implied, for the payment of money not secured by mortgage, loan, or pledge on real or personal property, or, if so secured, when such has been rendered nugatory by the act of the defendant.—*Bowman v. Wade*, 347.

MORTGAGE—DISAFFIRMANCE—DUTY OF GUARDIAN—INSANE PERSON.

2. The guardian of an insane person has no discretion to ratify a mortgage given by his ward, but is bound at his peril to disaffirm and avoid it.—*Bowman v. Wade*, 347.

MORTGAGES—FORECLOSURE—SCOPE OF RELIEF—ADVERSE CLAIMS.

4. The only proper object of a suit to foreclose a mortgage being to bar the mortgagor and those claiming under him, the court in such a suit had no jurisdiction to determine an alleged title paramount to that of the mortgagor, set up by certain of the defendants in an answer containing a prayer only that the suit be dismissed as to them.—*Gennes v. Peterson*, 378.

MORTGAGES—FORECLOSURE—PERSONAL JUDGMENT.

5. Where the decree in a creditors' suit was not intended to operate as a personal judgment against the fraudulent grantor, but only as a determination of the amount due interveners to settle the extent of the liability of the property involved therein, interveners were not entitled to a personal judgment against such fraudulent grantor in a subsequent suit to foreclose a mortgage on the property.—*Alexander v. Munroe*, 500.

MUNICIPAL CHARTERS.

Same as CHARTERS OF CITIES.

MUNICIPAL CORPORATIONS.

MUNICIPAL CORPORATIONS—CONSTRUCTION OF SEWERAGE SYSTEM—CONTRACTS—"ETC."

1. A contract for the construction of a sewerage system, stipulating that the city may pay for the work in legally issued bonds, or in cash out of the general fund, as it may elect, but that the city shall "pay for any readvertising, etc., required to satisfy the attorney" of the contractor that the bonds are legally issued, requires the contractor to accept legally issued bonds, and not to merely accept such bonds as his attorney shall advise him are legally issued; and, where such attorney assumes that it is impossible to issue any valid bonds in any way, the contractor cannot refuse to perform because of the failure of the city to pay the cost of advertising, etc., required to satisfy the attorney of the legality of the bonds; the term "etc." meaning other things of like character.—*Naylor v. McColloch, Mayor*, 305.

MUNICIPAL CORPORATIONS—POWERS.

2. Municipal corporations have no powers except such as are granted in express words by their charters, or such as are necessarily implied from those so granted, or those essential to the declared objects and purposes of the corporation.—*Naylor v. McColloch, Mayor*, 305.

MUNICIPAL CORPORATIONS—CONSTRUCTION OF SEWERAGE SYSTEM—PAYMENT—BONDS—SPECIAL ASSESSMENTS.

3. Sumpter City Charter (Sp. Laws 1901, p. 95), authorizing the levy of a special tax for any specific city purpose, and to issue bonds for any specific purpose, empowering the city to construct sewers, the cost of which is to be assessed to the property benefited, and setting forth a complete system for constructing sewers by assessments, etc., authorizes the city to issue bonds for the construction of a sewerage system, or to levy an assessment on property benefited, to pay for the cost thereof; a sewer being a specific city purpose.—*Naylor v. McColloch, Mayor*, 305.

MUNICIPAL CORPORATIONS—PAYMENT OF CLAIMS—POWERS.

4. Under Sumpter City Charter (Sp. Laws 1901, p. 95), providing that demands which the council shall pay shall be for corporate purposes, and none other, the council has no power to order the payment to a contractor of money forfeited to the city because of the contractor's failure to perform his contract; the claim for repayment not being for a corporate purpose.—*Naylor v. McColloch, Mayor*, 305.

MUNICIPAL CORPORATIONS—DEMANDS—PAYMENT—POWER OF MAYOR.

5. Sumpter City Charter (Sp. Laws 1901, p. 95), declaring that the mayor is the chief executive, and must exercise supervision over the general affairs of the city and subordinate officers, requires the mayor to refuse to sign a warrant for the payment of money illegally ordered by the council.—*Naylor v. McColloch, Mayor*, 305.

MUNICIPAL CORPORATIONS—INDEBTEDNESS—CONSTITUTIONAL LIMITATIONS—RESTRICTIONS IN INCORPORATION ACTS.

6. Section 5, Article XI, Constitution of Oregon, provides that acts incorporating towns and cities shall restrict their powers of contracting debts. Section 10 provides that no county shall create any debts exceeding the sum of \$5,000. *Held*, that neither of said sections is violated by act February 12, 1909 (Laws 1909, p. 78), providing for the incorporation under general law of ports in counties on bays or rivers navigable from the sea, because of no specific limitation of indebtedness being placed on municipalities to be created under it; such municipalities being neither towns or cities or counties.—*Straw v. Harris*, 424.

CONSTITUTIONAL LAW—DISTRIBUTION OF GOVERNMENTAL POWERS—POWER OF COURTS—WISDOM OF LEGISLATION.

7. The courts may not say whether or not legislation is wise, reasonable, unjust, or oppressive; that function being for the legislative department only.—*Straw v. Harris*, 424.

MUNICIPAL CORPORATIONS—INDEBTEDNESS—CONSTITUTIONAL LIMITATIONS.

8. Section 5, Article XI, Constitution of Oregon, provides that acts incorporating towns and cities shall restrict their powers of taxation, contracting debts, etc. Section 10 provides that no county shall create any debts or liabilities exceeding a certain sum. *Held* that, since the right given by the Constitution to form larger municipalities necessarily carries with it power to include those more limited in territory regardless of the proportionate increase in the indebtedness and taxation to follow that may necessarily accrue to the included towns by reason thereof, the limitation placed on the corporations enumerated applies only to each standing as a separate and distinct political division, and not to a larger municipality of which they may form an integral part; and hence act February 12, 1909 (Laws 1909, p. 78), providing for the incorporation under general laws of ports in counties bordering on bays or rivers navigable from the sea, is not unconstitutional as imposing on incorporated towns within the limits of a port indebtedness and taxes exceeding the limitations prescribed in such sections.—*Straw v. Harris*, 424.

MUNICIPAL CORPORATIONS—AMENDMENT OF CHARTERS.

9. Since act February 12, 1909 (Laws 1909, p. 78), providing for the incorporation under general law of ports in counties bordering on bays or rivers navigable from the sea, does not, by permitting the incorporation of ports, thereby directly attempt to amend the charter of any city or town within the boundaries thereof, but may only affect the charters and ordinances of such cities and towns to the extent that they may conflict with the general object for which the port may be organized, the act does not contravene Section 2, Article XI, Constitution of Oregon, as amended June 4, 1909, providing that the legislative assembly shall not enact, amend, or repeal any charter or act of incorporation of any municipality, city, or town, and giving the legal voters of every city or town power to enact and amend their municipal charter.—*Straw v. Harris*, 424.

MUNICIPAL CORPORATIONS—AMENDMENT OF CHARTERS.

10. Municipalities are but mere departments or agencies of the State, charged with the performance of duties for and on its behalf and subject always to its control, and it may therefore, regardless of any declarations in its constitution to the contrary, at any time revise, amend, or even repeal any of the charters within it, subject to vested rights and limitations otherwise provided by fundamental laws.—*Straw v. Harris*, 424.

MUNICIPAL CORPORATIONS—INITIATIVE AND REFERENDUM—ADOPTION BY ORDINANCE—"ORDAIN."

11. General Laws 1907, p. 406, c. 2, § 12, provides that a petition for a proposed ordinance, charter, or amendment to the charter of any city shall be filed with the city clerk, who shall transmit it to the next session of the council, which shall either ordain or reject the same, as proposed, within thirty days thereafter; but if rejected, or no action is taken thereon within that time, it shall be submitted to the voters. *Held*, that the word "ordain" is employed in the sense of "adopt" or "approve"; that is, the council may either approve

or reject the proposed charter or ordinance, after which proceedings may be taken as therein directed, and hence the adoption of a proposed charter by resolution, instead of by ordinance, was sufficient.—*Haines v. City of Forest Grove*, 443.

PLEADING—DEMURRER—CONSTRUCTION OF PLEADINGS.

12. When tested by demurrer, pleadings must be most strongly construed against the pleader.—*Haines v. City of Forest Grove*, 443.

MUNICIPAL CORPORATIONS—INITIATIVE AND REFERENDUM—TITLE.

13. General Laws 1907, p. 406, c. 226, § 12, provides that if any ordinance, charter, or amendment to the charter of any city shall be proposed by petition, and is not rejected or approved by the council within thirty days, the clerk shall submit the bill to the voters at the next ensuing election, and that, if the proposition meets with the approval of the council and they shall so ordain, it may either be submitted to the voters or the council may declare and thereby make it effective without such submission. *Held*, that where a charter was properly proposed and submitted under a resolution approving the bill, the adoption having been regular, the title, reciting that it was a bill "to propose . . . by initiative petition," was sufficient, though it did not appear that it was proposed by a resolution of the council.—*Haines v. City of Forest Grove*, 443.

MUNICIPAL CORPORATIONS—INITIATIVE AND REFERENDUM—TITLE.

14. General Laws 1907, p. 308, c. 226, relating to the initiative and referendum, provides in Section 5 that when any measure shall be filed with the Secretary of State to be referred to the people, or shall be proposed by initiative petition, a copy thereof shall be transmitted to the Attorney General, who shall provide a title for the measure. Section 10 provides that as to cities and towns the duties required of the Attorney General by the act shall be performed by the city attorney as to municipal legislation. *Held*, that where the title to a bill proposing an amended charter was adequate, and the city at the time of the proceedings had no city attorney, failure to have the title prepared by the city attorney did not invalidate the election.—*Haines v. City of Forest Grove*, 443.

MUNICIPAL CORPORATIONS—ELECTIONS—WHAT CONSTITUTES A MAJORITY.

15. In a city having three hundred and thirty legal voters, who were qualified to vote upon the question of the adoption of a new charter, but one hundred and sixty-two votes were cast, ninety-two for and seventy against the proposed charter. *Held*, that only a majority of those voting is all that is required to adopt the new charter, and when the statute is silent, it will be presumed that the electors who do not vote are in favor of the measure.—*Haines v. City of Forest Grove*, 443.

Municipal Corporations May Demand From County, Road Taxes Collected within Municipality. See STATUTES, 8.

MURDER.

See HOMICIDE.

NAVIGABLE WATERS.

NAVIGABLE WATERS—CONVEYANCES—RIPARIAN RIGHTS.

1. Where defendant's remote grantor platted land situated on a navigable lake and river, and defendant thereafter acquired certain lots lying north of a certain street and extending into the water, defendant did not acquire any riparian rights south of the street, the original grantor and his successors retaining such rights, and hence defendant could not obstruct the lake or river south of the street to the injury of a riparian owner.—*Oliver v. Klamath Lake Nav. Co.*, 85.

NAVIGABLE WATERS—NATURAL WATER COURSES—OBSTRUCTION—ACTIONS—DAMAGES.

2. Obstructions to navigation, unless legally authorized, are a nuisance, for the maintenance of which the person causing it is liable in damages to one specially injured thereby, or which he may enjoin or have abated.—*Oliver v. Klamath Lake Nav. Co.*, 85.

NAVIGABLE WATERS—OBSTRUCTION—RIGHT TO INJUNCTION.

3. Plaintiff has access by water at all times to his property which is situated on a river near its entrance into a lake, if the waters are free from obstruction, but the erection of a wharf in the river and lake by defendant

who has no riparian rights at that point, would, on account of the lake water freezing in winter, prevent access from the river, and also tend to cause the river to freeze in winter, further impeding plaintiff's access to his property. *Held*, that the injury to plaintiff's riparian rights entitled him to enjoin the erection of the wharf and to have removed any part thereof already erected. — *Oliver v. Klamath Lake Nav. Co.* 95.

NEGLIGENCE.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

1. The burden of proving contributory negligence is on defendant, and plaintiff need not show freedom from negligence. — *Gentskow v. Portland Railway Co.*, 114.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

2. Where the evidence offered to establish negligence of defendant, resulting in injury to plaintiff, showed that plaintiff was guilty of negligence, without which the injury would not have occurred, plaintiff could not recover. — *Gentskow v. Portland Railway Co.* 114.

NEGLIGENCE—ASSUMPTION OF RISK.

3. Where no contract relation existed between plaintiff, suing for a personal injury, and defendant, the doctrine of assumption of risk, as distinguished from contributory negligence, did not apply, unless plaintiff knew and appreciated the danger and voluntarily put himself in the way of it. — *Gentskow v. Portland Railway Co.* 114.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

4. Contributory negligence will not in all cases be imputed, as a matter of law, to a person who receives an injury from a danger, simply from the fact that it might have been seen, because the nature of his duties or surrounding circumstances may be such as to distract his attention to other objects, and under such circumstances the question is for the jury. — *Gentskow v. Portland Railway Co.* 114.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

5. Where contributory negligence is urged, as a ground for nonsuit, or for a verdict for defendant, it must appear, after considering the evidence most favorably to plaintiff, that reasonable men would find, without any reasonable probability of differing in their views, either that plaintiff knew and appreciated the danger, or that ordinarily prudent men would acquire such knowledge and appreciation. — *Gentskow v. Portland Railway Co.* 114.

NEGLIGENCE—RAILROADS—OPERATION.

6. Negligence cannot be predicated on the mere fact that a freight train is behind time, and it matters not from what particular cause the delay arose. — *Russell v. Oregon R. & N. Co.* 128.

NEGLIGENCE—OPERATION OF TRAINS—QUESTION FOR JURY.

7. In an action for the death of a traveler struck by a train at a crossing, evidence *held* to require submission to the jury of the issue of negligence in operating the train at a dangerous speed. — *Russell v. Oregon R. & N. Co.* 128.

NEGLIGENCE—NEGLECT ACT—LIABILITY.

8. One is liable for any act, the injurious consequences of which an ordinarily prudent man would be likely to see and guard against. — *Russell v. Oregon R. & N. Co.* 128.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

9. An infant is, as a general rule, only required to exercise that care in avoiding injury that the evidence shows him to be capable of. — *Russell v. Oregon R. & N. Co.* 128.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

10. A boy 13 years old, bright and intelligent, does not, as a matter of law, possess the judgment and discretion of an adult, and the question of his exercising proper care in avoiding injury is for the jury. — *Russell v. Oregon R. & N. Co.* 128.

NEGLIGENCE—RAILROADS—OPERATION OF TRAINS.

11. No rate of speed of trains is negligence *per se*, but there are circumstances which require a diminished speed, and it is only the force of such circumstances which creates such a duty. — *Russell v. Oregon R. & N. Co.* 128.

NEGLIGENCE — INJURIES TO PERSON OR PROPERTY — ELEMENTS OF LIABILITY.

12. To maintain an action for injury to person or property by reason of negligence, there must be shown to exist some obligation or duty towards plaintiff which defendant has left undischarged or unfulfilled.—*Kennedy v. Hawkins*, 164.

NEGLIGENCE—COMPLAINT.

13. A complaint for injuries resulting from negligence should allege what duty was imposed on defendants toward plaintiff, or state facts from which the law would imply a duty, and then charge a breach or negligent performance thereof.—*Kennedy v. Hawkins*, 164.

NEGLIGENCE—DANGEROUS WORK—CARE REQUIRED.

14. Where workmen were engaged to repair or underpin the wall of a building, the work being essentially dangerous to person and property of the occupants, the workmen were required to use reasonable care and skill in the performance of the work, although as to such occupants they were not bound to undertake it.—*Kennedy v. Hawkins*, 164.

NEGLIGENCE—DANGEROUS WORK—DELAY.

15. Workmen agreeing with the owner to support the wall of a building sustained no contractual relation to occupants thereof, so that delay in beginning the work, if any, was not available to such occupants in a suit for injuries to their property by alleged negligent performance of the work.—*Kennedy v. Hawkins*, 164.

NEGLIGENCE—PLEADING—COMPLAINT.

16. A complaint alleging negligence generally, without charging the particular facts showing the act or omission to have been negligent, is sufficient, in the absence of an application for a more specific statement.—*Kennedy v. Hawkins*, 164.

NEGLIGENCE—COMPLAINT ISSUES AND PROOF.

17. Where a complaint contains a general averment of negligence, and defendant joins issue without moving for a more specific statement, proof of any negligence within the general scope of the allegation in the complaint is competent.—*Kennedy v. Hawkins*, 164.

NEGLIGENCE—COMPLAINT—ISSUES AND PROOF.

18. That defendant joined issue on a complaint averring negligence generally without moving to make the pleading more definite, did not relieve plaintiff from the obligation to prove a particular act of negligence.—*Kennedy v. Hawkins*, 164.

NEGLIGENCE—RES IPSA LOQUITUR.

19. Where defendants undertook to underpin the foundation of a building, and while doing so the building fell, such facts alone did not establish negligence, as defendants were not insurers of the successful performance of the work without fault or error of judgment, but were only liable for negligence, bad faith, or dishonesty.—*Kennedy v. Hawkins*, 164.

NEGLIGENCE—FINDING—CAUSE OF ACTION.

20. In an action for injuries to the personal property of the occupants of a building by the falling of a wall thereof while defendants were performing a contract with the owner to underpin and support the same, evidence held insufficient to sustain a finding that the falling of the wall was attributable to defendants' negligence.—*Kennedy v. Hawkins*, 164.

NEGLIGENCE—MASTER AND SERVANT—INJURIES TO SERVANT.

21. A railroad employee injured while working on an engine held negligent.—*Brasel v. Oregon R. & N. Co.*, 157.

NEGLIGENCE—EVIDENCE OF SUBSEQUENT CONDUCT.

22. Evidence of additional precautions or of subsequent repairs is not competent to prove antecedent negligence, but it may be competent as showing that the property where the injury was received belonged to, or was in control of, defendant.—*Ferrari v. Beaver Hill Coal Co.*, 210.

NEGLIGENCE—INJURIES TO SERVANT—NEGLIGENCE OF MASTER—QUESTION FOR JURY.

23. In an action for injuries to a servant by the sudden starting of machinery, evidence held to require submission of the question whether the injury was the result of defendant's negligence, to the jury.—*Rogers v. Portland Lumber Co.*, 388.

NEW TRIAL.

Grounds Not Sufficient to Warrant New Trial. See CRIMINAL LAW, 28.

NONSUIT.

NONSUIT—EJECTMENT—TRIAL.

1. A motion for nonsuit in ejectment, on the ground that the evidence shows title only to tide lands, while the complaint describes land only below low tide, is properly denied, where the answer admits the premises are above low tide.—*Seabrook v. Coos Bay Ice Co.* 172.

NONSUIT—APPEAL AND ERROR—MOTION FOR NONSUIT—REVIEW.

2. The denial of a motion for a nonsuit must be reviewed on appeal with reference to the entire record submitted, and must be affirmed if the proof adduced was admissible and discloses facts entitling the case to be submitted to the jury.—*Taylor v. Taylor*, 560.

NOTICE.

NOTICES—HIGHWAYS—PROCEEDINGS TO VACATE.

Laws 1908, p. 204, § 8, provide that, when a petition shall be presented to the county court for vacating a county road, it shall be accompanied by satisfactory proof that notice has been given by advertisement, posted thirty days previous to the presentation of the petition to the court at its next session. Notices were posted September 8d, reciting that application to vacate part of a county road would be made to the county court at its next session on October 8d. Held that, as the thirty days limited for the posting of the notices did not expire until the last hour of October 8d, they were posted only twenty-nine days prior to the next session of the county court, and the court did not acquire jurisdiction.—*Rynearson v. Union County*, 181.

Notice of Election Under Local Option Law. See INTOXICATING LIQUORS, 4, 5, 6.

NUISANCE.

NUISANCE—LOCATION AND PUBLICITY.

1. There are some nuisances in which the act complained of may be wrongful, but constitutes a nuisance only by means of its location or publicity, and there may be an act or condition that is rightful, or even necessary, but which may become a nuisance by the same means, but there is also a class of nuisances arising from the use of real property, and from one's personal conduct, that are such *per se* irrespective of their location or publicity.—*State v. Atwood*, 523.

NUISANCE—CRIMINAL OFFENSE—KEEPING "MATERNITY HOSPITAL" FOR ABORTIONS.

2. Section 1930, B. & C. Comp., generally known as the "nuisance statute," provides that if any person shall willfully and wrongfully commit an act which grossly injures the person or property of another, or grossly disturbs the public peace or health, or openly outrages public decency, and is injurious to public morals, he shall be punished, etc. Held, that the acts complained of in an indictment thereunder, charging the establishment and maintenance of a public "maternity hospital" for willfully, wrongfully, and unlawfully committing, producing, and procuring abortions, and of having willfully and wrongfully committed abortions therein, openly outrage public decency, are injurious to public morals, and constitute a nuisance, though they are not performed in a public place, and though they do not disturb the peace or quiet of the community or the public.—*State v. Atwood*, 526.

NUISANCE—KEEPING MATERNITY HOSPITAL FOR ABORTIONS—REQUISITES OF INDICTMENT.

3. The offense of one who is guilty of a nuisance in keeping a maternity hospital for committing abortions relates to the business or condition, and an indictment therefor need not allege that the acts of defendant in producing abortions were done in cases where the operation or procurements were unnecessary, though if there was a statute authorizing the procuring of abortions in certain cases, it might be necessary to negative such exceptions.—*State v. Atwood*, 526.

NYSSA CITY, CHARTER OF.

City of Nyssa v. Malheur County, 286.

OREGON DECISIONS.

Applied, Approved, Cited, Distinguished, Followed, and Overruled in This Volume. See Table in Front of This Volume.

OREGON CONSTITUTION.

Cited and Construed in This Volume. See Table in Front of This Volume.

OREGON STATUTES.

See Table in Front of This Volume.

PARDON.

PARDON—"REPRIEVE."

A "reprieve" is a respite by the Governor from a sentence of death.—*State v. Finch*, 482.

PARTNERSHIP.

PARTNERSHIP—PERSONAL LIABILITY—VIOLATION OF AGREEMENT.

1. Where a partner, in violation of an express agreement not to extend credit to relatives, advances money from the partnership funds or sells partnership goods to an impecunious relative, he is personally liable for the account.—*McCoy v. Crossfield*, 591.

PARTNERSHIP—DISSOLUTION—LIABILITY—PERSONAL ACCOUNT.

2. Where, upon the dissolution of a partnership, one of the partners was indebted to the firm upon his private account, he was chargeable with the full amount of the debt, notwithstanding the fact that the purchaser, at the receiver's sale of the assets and accounts of the firm, was the other partner.—*McCoy v. Crossfield*, 591.

PHRASES.

See WORDS AND PHRASES.

PLEADING.

PLEADING—JURISDICTIONAL AVERMENT IN COMPLAINT.

1. To secure jurisdiction of the person of a defendant foreign corporation, held that it was not indispensable that the complaint should aver that it was engaged in business in the State.—*Multnomah Lumber Co. v. Weston Basket Co.*, 22.

PLEADING—NEGLIGENCE.

2. A complaint for injuries resulting from negligence should allege what duty was imposed on defendants toward plaintiff, or state facts from which the law would imply a duty, and then charge a breach or negligent performance thereof.—*Kennedy v. Hawkins*, 164.

PLEADING—COMPLAINT—NEGLIGENCE.

3. A complaint alleging negligence generally, without charging the particular facts showing the act or omission to have been negligent, is sufficient in the absence of an application for a more specific statement.—*Kennedy v. Hawkins*, 164.

PLEADING—NEGLIGENCE—COMPLAINT—ISSUES AND PROOF.

4. Where a complaint contains a general averment of negligence, and defendant joins issue without moving for a more specific statement, proof of any negligence within the general scope of the allegation in the complaint is competent.—*Kennedy v. Hawkins*, 164.

PLEADING—NEGLIGENCE—COMPLAINT—ISSUES AND PROOF.

5. That defendant joined issue on a complaint averring negligence generally without moving to make the pleading more definite, did not relieve plaintiff from the obligation to prove a particular act of negligence.—*Kennedy v. Hawkins*, 164.

PLEADING—ALLEGATION AS TO NOTICE—CONCLUSION OF LAW.

6. An allegation as to the notice of a local option election, that "no notice was ever issued or posted as by law provided," is a mere statement or conclusion of law, presenting no question of fact whether a notice was ever issued or posted.—*State ex rel. v. Malheur County Court*, 255.

PLEADING—RATIFICATION—BROKERS—ACTIONS.

7. In an action for commissions, claimed to have been earned by the purchase of land for defendant, where the latter claimed that plaintiff acted in violation of his agency by paying a higher price per acre than he was authorized, etc., allegations of the complaint that plaintiff notified defendant from time to time of the purchases, the purchase price, amounts of payments, etc., and defendant, knowing of the purchases and terms thereof, ratified them, as well as the allegations of the reply that the payments of the land in excess of the price thereof were made with defendant's knowledge, and ratified by him, sufficiently alleged ratification.—*Mahon v. Rankin*, 328.

PLEADING—RATIFICATION—PRINCIPAL AND AGENT—ACTIONS.

8. An allegation that the principal, with full knowledge of the facts, ratified the agent's unauthorized act is sufficient, without setting out how it was ratified.—*Mahon v. Rankin*, 328.

PLEADING—ISSUES AND PROOF—MATTERS TO BE PROVED—ADMISSIONS.

9. In an action against a master for injuries to a servant, the complaint alleged that plaintiff was caught upon a revolving shaft by a set screw, and the answer alleged that plaintiff, who was working around and attempting to oil the machinery, allowed his clothing to "drop down on the shaft and under the guard, so that it came in contact with the said set screw, * * and he was drawn into the said machine." *Held*, that the admission in the answer renders unnecessary any proof that plaintiff's clothes caught on the set screw.—*Bigelow v. Columbia Gold Mining Co.* 451.

PLEADING—LIENS—CONVERSION OF LOGS—ACTIONS.

10. A complaint based on Section 5692, B. & C. Comp., making a person who, without the consent of the lien claimant, renders impossible of identification any logs on which there is a lien liable to the lienholder, which alleges that defendants, fraudulently conniving, conspiring, and confederating to cheat and defraud plaintiff out of his labor and lien security, destroyed and removed all of the logs and rendered the same impossible of identification, and appropriated the same to their own use, sufficiently negatives the consent of plaintiff to the removal as against a demurrer.—*Willett v. Kinney*, 594.

PLEDGES.**PLEDGES—EVIDENCE AS TO CHARACTER OF TRANSACTION—BURDEN OF PROOF.**

1. One admitting that another is the owner of personal property, but insisting that it is subject to a pledge to him for pre-existing debt, has the burden of proving the debt and pledge.—*Patton v. Washington*, 479.

PLEDGES—TRANSFERS OF PERSONAL PROPERTY—OBLIGATION OF TRANSFEREE.

2. One receiving personal property from an insane person and learning of the insanity must take ordinary care of the property with a view of returning it on the latter being restored to sanity.—*Patton v. Washington*, 479.

PRESUMPTION.**PRESUMPTION—APPEAL AND ERROR—CHANGE OF VENUE IN JUSTICE COURT.**

1. As it will be presumed pursuant to Section 188, subd. 15, B. & C. Comp., that official duty has been performed, *held*, that it would be taken for granted on appeal in a particular case that a cause in a justice's court was properly transferred pursuant to section 2215, that the court had jurisdiction of the subject matter, and that, as an answer was filed, it also had jurisdiction of the judgment defendant.—*White v. Brown*, 7.

PRESUMPTION—CAPITAL PUNISHMENT—HOMICIDE—CRIMINAL LAW.

2. Where a constitutional provision has been copied from the constitution of another state, after it has been construed by the courts of that state, it will be presumed to have been adopted with the construction placed upon it by the courts of the state where it originated, and it must be regarded as settled in this State that the legislature derives authority from the constitution to enact laws for the infliction of punishment by death, in proper cases.—*State v. Finch*, 482.

PRINCIPAL AND AGENT.**PRINCIPAL AND AGENT—ACTIONS—JURY QUESTION—AUTHORITY.**

1. Where the authority of an agent is disputed, the question is for the jury.—*Mahon v. Rankin*, 328.

PRINCIPAL AND AGENT—ACTIONS—PLEADING—RATIFICATION.

2. An allegation that the principal, with full knowledge of the facts, ratified the agent's unauthorized act, is sufficient, without setting out how it was ratified.—*Mahon v. Rankin*, 328.

PRINCIPAL AND AGENT—RATIFICATION—RATIFICATION IN PART.

3. Where defendants' agent sold lots for them, receiving an increased price because of representations that an adjacent tract would be opened as a street, defendants, having received the proceeds of the sale, cannot assert that their agent exceeded his authority in making such representations.—*Morse v. Whitcomb*, 412.

PROCESS.**PROCESS—SERVICE OF SUMMONS ON FOREIGN CORPORATION.**

1. Where a foreign corporation, pursuant to the requirement of a statute, appoints an attorney in fact or other representative on whom process shall be served, the statutory method is generally exclusive, and service of summons on any other agent is ineffectual.—*Cunningham v. Klamath Lake R. Co.* 13.

PROCESS—FOREIGN CORPORATIONS—STATUTES.

2. In absence of any express legislation on the subject, Section 55, subd. 1, B. & O. Comp., relating to the service of summons in actions against private corporations, applies to foreign corporations doing business in the State.—*Cunningham v. Klamath Lake R. Co.* 13.

PROCESS—SERVICE OF SUMMONS—WAIVER.

3. A defendant waives his right to object to a judgment for want of proper service of summons by appearing and asking leave to answer to the merits.—*Anderson v. McClellan*, 206.

PUBLIC LANDS.**PUBLIC LANDS—GRANTS TO STATES—SELECTION OF LANDS.**

1. Act Cong. July 5, 1866, c. 174, 14 Stat. 89, granted to Oregon for the construction of a military wagon road, alternate odd-numbered sections of public land, three sections per mile to be selected within six miles of said road, and Act June 18, 1874, c. 306, 18 Stat. 80, provided that patent should issue to the grantee of the State after the lands had been selected and approved. *Held*, that the selection by a road company to which the State granted its right and the filing of the selection list did not pass the title from the government until the selection was approved by the Secretary of the Interior.—*Boe v. Arnold*, 52.

PUBLIC LANDS—GRANTS FOR INTERNAL IMPROVEMENT—ASSIGNMENT BY STATE—RIGHTS OF GRANTEE.

2. Where a military wagon road company, as assignee of the State, has filed its selection of lands under Act Cong. July 5, 1866, c. 174, 14 Stat. 89, granting to the State certain land to aid in the construction of a military wagon road to be selected within six miles of the road, and thereafter a part of the land is withdrawn by the Secretary of the Interior and other lands selected by the company were taken by it in place of the lands withdrawn, so that the company had received its full quota of lands under the grant, a grantee of the wagon road company is estopped from claiming land covered by the original selection.—*Boe v. Arnold*, 52.

PUBLIC LAND—ADVERSE POSSESSION—PRIOR GRANT.

3. One claiming title to land by adverse possession for a period of ten years as against all persons, but recognizing the superior title of the United States Government, and seeking in good faith to acquire that title, may assert such adverse possession as against any person claiming to be the owner under a prior grant.—*Boe v. Arnold*, 52.

QUESTION FOR JURY.**QUESTION FOR JURY—MASTER AND SERVANT—INJURY TO SERVANT.**

1. In an action for injuries to a brakeman owing to the train on which he was riding having passed through an open switch and collided with a car, the question whether he was negligent in riding on a step of the tender, *held* one for the jury.—*Abel v. Coos Bay, Roseburg & E. R. & N. Co.* 188.

QUESTION FOR JURY—INJURIES TO SERVANT—NEGLIGENCE.

2. Where, in an action for injuries to a brakeman on a logging train owing to the train having passed on an open switch and collided with a car, the

evidence showed that it was customary for the switch to be left open after certain switching operations, which had recently been completed when the accident occurred, and that plaintiff had reason to believe that it was open, the condition of the switch did not constitute negligence. The question whether it was the proximate cause of the injury, *held* one for the jury.—*Abel v. Coos Bay, Roseburg & E. R. & N. Co.* 188.

QUESTION FOR JURY—MASTER AND SERVANT—INJURY TO SERVANT.

3. In an action for injuries to a brakeman owing to the train on which he was riding having passed upon an open switch and collided with a car, the question whether defendant was negligent in leaving the car on the track, *held* for the jury.—*Abel v. Coos Bay, Roseburg & E. R. & N. Co.* 188.

QUESTION FOR JURY—AUTHORITY.

4. Where the authority of an agent is disputed, the question is for the jury.—*Mahon v. Rankin*, 328.

QUESTION FOR JURY—AUTHORITY.

5. While the question of the authority of an agent is for the jury, where it is disputed, the court should declare whether a given act is in excess of the agent's authority, so that, in an action for commissions for purchasing land for defendant, the court properly instructed that any payments made by plaintiff to sellers in excess of the amount limited by defendant was without authority.—*Mahon v. Rankin*, 328.

QUESTION FOR JURY—INJURIES TO SERVANT—SAFEGUARDING GEARING.

6. Where a machine, by which plaintiff was injured while assisting to repair it, was liable to start automatically, whether it was a safe place for repairers without safeguarding the gearing, was for the jury.—*Rogers v. Portland Lumber Co.* 348.

QUESTION FOR JURY—INJURIES TO SERVANT—KNOWLEDGE OF FOREMAN—DEFECTIVE MACHINERY.

7. Knowledge of defendant's foreman that certain machinery in its mill was liable to start automatically was the knowledge of defendant, and whether it was negligence for defendant to leave the gearing unguarded, was a question for the jury.—*Rogers v. Portland Lumber Co.* 348.

RAILROADS.

RAILROADS—OPERATION OF TRAINS—CARE REQUIRED.

1. A railroad must use all reasonable precautions to protect the traveling public from injury from the operation of its trains, and such precautions must be reasonably commensurate with the danger; the duty varying with the circumstances of each particular case.—*Russell v. Oregon R. & N. Co.* 128.

RAILROADS—OPERATION OF TRAINS—CARE REQUIRED.

2. Whether a railroad was negligent in failing to provide a flagman or automatic signals at a crossing, *held* under the evidence for the jury.—*Russell v. Oregon R. & N. Co.* 128.

RAILROADS—OPERATION OF TRAINS—CARE REQUIRED.

3. Where the undisputed evidence shows extraordinary dangers to the traveling public on a railroad crossing, it is not error to submit to the jury the question whether reasonable care demands that a watchman, or other method of warning than the use of the bell or whistle, should be adopted.—*Russell v. Oregon R. & N. Co.* 128.

RAILROADS—ACCIDENT AT CROSSING—PROXIMATE CAUSE.

4. A freight train, equipped with air brakes, and managed entirely from the engine, was half an hour late in reaching a highway crossing. The absence of a brakeman delayed the train, but there was nothing to show that the train was run at any different speed, or managed in any different way, than it would have been had the brakeman been at his post. *Held*, that the absence of the brakeman was not the proximate cause of an accident occurring at the highway crossing in collision with a traveler.—*Russell v. Oregon R. & N. Co.* 128.

RAILROADS—CROSSING ACCIDENT—MISLEADING INSTRUCTIONS.

5. Where, in an action for the death of a traveler struck by a train at a railway crossing, the complaint alleged a negligent failure to have a full crew of train hands, but the evidence failed to support the allegation, an instruction, making it the duty of a railroad to man its trains with a sufficient crew, was misleading, because it could only refer to the want of a brakeman, established by the evidence.—*Russell v. Oregon R. & N. Co.* 128.

RAILROADS—NEGLIGENCE—OPERATION.

6. Negligence cannot be predicated on the mere fact that a freight train is behind time, and it matters not from what particular cause the delay arose.—*Russell v. Oregon R. & N. Co.* 128.

RAILROADS—OPERATION OF TRAINS—NEGLIGENCE.

7. No rate of speed of trains is negligence *per se*, but circumstances may require a diminished speed, and it is only the force of such circumstances which creates such a duty.—*Russell v. Oregon R. & N. Co.* 128.

RAILROADS—OPERATION OF TRAINS—NEGLIGENCE.

8. In an action for the death of a traveler struck by a train at a crossing, evidence held to require submission to the jury of the issue of negligence in operating the train at a dangerous speed.—*Russell v. Oregon R. & N. Co.* 128.

RAILROADS—CROSSING ACCIDENT—MISLEADING INSTRUCTIONS.

9. In an action for death of a traveler, struck by a train at a railroad crossing, defendant requested the following instruction: "The convenience of the public and commercial industry demand the conveyance of passengers and freight at a greater speed than can be accomplished by ordinary conveyance; that the railroad company cannot be required to slow down its trains, or run at such rate of speed across country crossings, or those in small villages, as will preclude the possibility of accident. Such requirements would be incompatible with rapid transit required of such companies. No rate of speed across a country crossing, or one in a small village, is of itself negligence; and, if you find from the evidence that the rate of speed at which said train was being operated, was consistent with the obligation resting on the company, then and in that event you cannot find defendant guilty of negligence on account of the rate of speed at which said train was being operated." Held, that the instruction was properly refused, because not stated in language sufficiently simple to enable the average juror to comprehend it.—*Russell v. Oregon R. & N. Co.* 128.

RAILROADS—ACCIDENTS AT CROSSINGS—NEGLIGENCE—INSTRUCTIONS.

10. Where, in an action for the death of a traveler struck by a train at a crossing, the complaint alleged negligence in failing to have a full train crew, and not reducing the speed of the train when approaching the crossing, in not sounding the whistle and ringing the bell, and in not maintaining a watchman or automatic whistle to warn travelers, and the evidence wholly failed to establish negligence in failing to have a full train crew, an instruction that plaintiff need not prove that the railroad company was negligent in all of the particulars alleged, but only that it was negligent in some of them, was erroneous, because it impliedly submitted to the jury the alleged failure to have a full train crew.—*Russell v. Oregon R. & N. Co.* 128.

REFORMATION OF INSTRUMENTS.

REFORMATION OF INSTRUMENTS—GROUNDS—MISTAKE.

An ambiguity arising out of a mortgagor's misconception that a quarter section line and the division line between the north half and the south half of a donation land claim were identical is not ground for correcting the description, when the language clearly shows that the mortgagor intended to convey to the division line established by the government survey, by which the claim was divided.—*Bernheim v. Talbot*, 30.

REPLEVIN.

REPLEVIN AFFIDAVIT—CONTENTS.

1. Under Section 285, subd. 4, B. & C. Comp., relating to claim and delivery, and providing that when a delivery is claimed, plaintiff shall make an affidavit that the property has not been taken for a tax, etc., when an immediate delivery is not claimed, such affidavit need not be made.—*O'Sullivan v. Blakely*, 551.

REPLEVIN—PROPERTY SUBJECT—PROPERTY TAKEN FOR TAX.

2. Under Section 285, subd. 4, B. & C. Comp., relating to claim and delivery, and providing that when a delivery is claimed plaintiff shall make an affidavit that the property has not been taken for a tax, while the provisional remedy of claim and delivery is not entirely co-ordinate with the common-law action of replevin, yet it conforms to the general rule that property seized for a tax on a warrant not void on its face cannot be replevied by the defendant in the tax warrant.—*O'Sullivan v. Blakely*, 551.

REPLEVIN—PROPERTY TAKEN FOR TAXES—PERSONALTY—DEFECTS IN WARRANT OR LEVY—EFFECT.

3. While a tax warrant, legal in form, proceeding from a court or officer authorized to issue it, and which on its face contains nothing fairly disclosing that it was improperly issued, will protect the officer executing it as if it were valid, it will not enable him to build up a title, either general or special, to property seized thereunder; and hence, when title to property is asserted by an officer undertaking to justify his execution of a tax warrant, he must show his authority, the regularity of the proceedings, and that the property levied on belongs to the person named in the warrant.—*O'Sullivan v. Blakely*, 551.

REPLEVIN—SALE FOR TAXES—ACTION TO TRY TITLE—ANSWER.

4. In an action to recover the possession of personal property or its value, an answer alleging the seizure and sale of the property under a tax warrant, but not setting forth the several steps required to be taken to form the basis of a valid tax, was insufficient.—*O'Sullivan v. Blakely*, 551.

RIPARIAN RIGHTS.

RIPARIAN RIGHTS—CONVEYANCES—NAVIGABLE WATERS.

1. Defendant held not to have acquired any riparian rights in navigable waters south of a certain street by its purchase of land bordering thereon north of the street, so that it could not obstruct the waters south of the street to the injury of a riparian owner.—*Oliver v. Klamath Lake Navigation Co.* 95.

RIPARIAN RIGHTS—NAVIGABLE WATERS—RIGHT TO INJUNCTION.

2. The injury to plaintiff's riparian rights in a navigable stream by the erection of a wharf therein by defendant at a point where he had no riparian rights, held to entitle plaintiff to enjoin the erection of the wharf, and to have removed any part thereof already erected.—*Oliver v. Klamath Lake Navigation Co.* 95.

RISKS.

Assumed by Servant. See MASTER AND SERVANT.

ROBBERY.

ROBBERY—INDICTMENT AND INFORMATION—INDICTMENT—ASSAULT WITH INTENT TO ROB.

1. Section 1768, B. & C. Comp., provides that "if any person, being armed with a dangerous weapon, shall assault another, with intent, if resisted, to kill or wound the person assaulted," and shall rob or take from the person assaulted any money which may be the subject of larceny, such person, upon conviction thereof, shall be punished. 1 B. & C. Comp., p. 750, prescribes as a form of indictment for an assault with intent to kill if resisted that "being armed with a dangerous weapon did commit an assault upon one O. D. with intent, if resisted, to kill or wound the said O. D., and then and there feloniously took," etc. Section 1806, B. & C. Comp., declares that an indictment must be direct and certain as regards the particular circumstances of the crime charged when necessary to constitute a complete crime, and Section 1805 provides that the manner of stating the act constituting the crime as set forth in the appendix to the Code is sufficient in the cases where the forms there given are applicable. Held that, in charging an assault and robbery with intent, if resisted, to kill or wound, it is unnecessary after charging that defendants were "armed with dangerous weapons, to wit: pistols," to allege that the pistols were then and there loaded with gunpowder and bullets, as the language of an indictment need not correspond with the form suggested or with the words of a statute, unless the expression used in the form is necessary to the validity of the accusation, and the descriptive phrase in the indictment, "to wit: pistols," was properly rejected as surplusage, and an averment that the money taken from the prosecuting witness was taken against his will is also unnecessary.—*State v. Farr*, 516.

ROBBERY—EVIDENCE—"PRESUMPTION" AND BURDEN OF PROOF.

2. Under Section 734, B. & C. Comp., defining a presumption as a deduction from particular facts, it will be presumed that, when an assault with intent to commit robbery is made by placing the muzzle of a pistol at or near the body of a person from whom money or property is expected to be taken by force, the weapon so employed is loaded with powder and ball, and is a dangerous weapon, and imposes upon the person accused, if he admit the use of the pistol, the burden of proving it was not so charged.—*State v. Farr*, 516.

ROBBERY—ADMISSIBILITY OF EVIDENCE.

8. In a prosecution for robbery, where no theory of the cause is advanced by defendant that would render material a plan or diagram of the interior of the jail in which defendants were incarcerated, a refusal to admit such a diagram is not error.—*State v. Parr*, 818.

ROBBERY—TRIAL—INSTRUCTIONS.

4. In a prosecution for robbery and assault with intent to kill if resisted, an instruction that if the jury find from the evidence beyond reasonable doubt that defendants, or either of them, are guilty of stealing from the person of the prosecuting witness the sum described in the indictment or some part thereof, but do not find that they or either of them assaulted said witness with intent, if resisted, to kill or wound said witness, then they should find the defendants or either of them guilty of the crime of larceny from the person, is not erroneous, as robbery is larceny aggravated by the circumstance that the property taken is taken from the person of another by violence or by putting him in fear, and the greater crime necessarily embraces the lesser offense of the same class.—*State v. Parr*, 818.

SALES.

SALES—UNDER EQUITABLE MORTGAGE—SUPERSEDEAS—EFFECT.

1. Where an appeal is perfected before a sale under a foreclosure decree, the sheriff should continue the sale until after the time limited for objection to the appellant's sureties, and then, in default of such objections, should release the property.—*Anderson v. Phegley*, 102.

SALES—AFTER APPEAL UNDER FORECLOSURE DECREE—SUPERSEDEAS.

2. A sale under a foreclosure decree and an order affirming same after the perfection of an appeal by one of the defendants, are invalid.—*Anderson v. Phegley*, 102.

SALES—CONTRACTS—CONSTRUCTION.

3. A contract for the sale and purchase of a crop of hops, binding the seller to sell the crop, and to deliver "contract" hops, binding the buyer to purchase "contract" hops, and to make advances, providing that, on the failure of the seller to do anything which a careful husbandman would do to produce "contract" hops, the buyer may receive the same at a reduced price, and where the seller for causes beyond his control is unable to deliver "contract" hops, the buyer will accept in satisfaction of the agreement the hops raised at the reduced price, and giving the buyer the right, prior to making the advances called for, to examine the hopyard, and releasing him from liability to make further advances, or to accept the hops, if on inspection it appears that "contract" hops cannot be produced, etc., is complied with by a delivery of a lower grade of hops resulting from conditions for which the seller is not responsible, and the mortgage clause in the contract is available to the buyer only for liquidated damages, where by reason of the negligence of the seller, the hops are of inferior grade; and the buyer, on finding that "contract" hops cannot be produced, because of conditions not the result of the neglect of the seller, cannot refuse to make advances and terminate the contract.—*Lachmund v. Lope Sing*, 106.

SALES—CONTRACTS—ABANDONMENT.

4. The act of a buyer of a crop of hops in refusing to make the advances called for by the contract, or to be bound further by the contract, is an abandonment of it, precluding a recovery of advances previously made, where the seller was not in default.—*Lachmund v. Lope Sing*, 106.

SALES—REGULARITY—BURDEN OF PROOF.

5. The sale of property by a tax collector is an *in invitum* proceeding, the regularity of which must be established by the officer attempting to uphold a title pursuant to the sequestration.—*O'Sullivan v. Blakely*, 551.

SALE FOR TAXES—ACTION TO TRY TITLE—ANSWER.

6. In an action to recover the possession of personal property or its value, an answer alleging the seizure and sale of the property under a tax warrant, but not setting forth the several steps required to be taken to form the basis of a valid tax, was insufficient.—*O'Sullivan v. Blakely*, 551.

SESSION LAWS OF OREGON

Cited and Construed in This Volume. See Table in Front of This Volume.

SPECIFIC PERFORMANCES.

SPECIFIC PERFORMANCES—MUTUALITY—NECESSITY OF SIGNATURE OF BOTH PARTIES.

Specific performances may be granted at the suit of one who did not sign the contract, against the other party who did.—*Flegel v. Dowling*, 40.

STATUTES.

STATUTES—AMENDING EXISTING STATUTES—VALIDITY.

1. Laws 1908, p. 89, relating to foreign corporations, *held* to amend, by implication, Sections 44, 55, 528, B. & O. Comp., and therefore not to be in conflict with any constitutional prohibition.—*Cunningham v. Klamath Lake R. Co.* 13

STATUTES—JURISDICTION—FOREIGN CORPORATIONS.

2. The requirement of Laws 1908, p. 89, as to foreign corporations filing statements with the Secretary of State, *held* to afford evidence that a foreign corporation is doing business in the state, but does not fix the place where actions against it may be maintained.—*Cunningham v. Klamath Lake R. Co.* 13

STATUTES—IMPLIED REPEALS—ACTS CONSTRUED AS ONE.

3. Repeals by implication will not be upheld unless the repugnancy between the prior and subsequent statute, on the same subject, is so manifest that both acts cannot remain in force, and if a later statute only modifies a prior statute, the two must be construed as one act.—*Cunningham v. Klamath Lake R. Co.* 13.

STATUTES—REPEAL BY IMPLICATION.

4. A clause in a city charter repealing all acts and parts of acts in conflict therewith, without reference to what particular acts it was intended to affect, would only accomplish a repeal by implication.—*State ex rel. v. Malheur County Court*, 255.

STATUTES—REPEAL BY IMPLICATION.

5. A repeal by implication only arises when both statutes cannot be reconciled with each other by any reasonable interpretation, or where the later act shows a clear intent by its terms to supersede the prior act.—*State ex rel. v. Malheur County Court*, 255.

STATUTES—REPEAL OF GENERAL STATUTES—OPERATION OF MUNICIPAL CHARTER PROVISIONS.

6. From the re-enactment of municipal charter provisions already in force with some additions thereto, and which is the old charter in a new dress, an intent to repeal a prior general statute will not be presumed.—*State ex rel. v. Malheur County Court*, 255.

STATUTES—REPEAL BY IMPLICATION.

7. Repeals by implication are not favored, and repugnancy between two statutes should be clear before a court is justified in holding that a later statute impliedly repeals an earlier one.—*State ex rel. v. Malheur County Court*, 225.

STATUTES—SPECIAL LAWS.

8. Nyssa City Charter (Sp. Laws 1908, c. 4), § 16, providing that the territory within the city limits shall be without the jurisdiction of the county court for the purpose of road taxes, is not in conflict with Section 23, Article IV, Constitution of Oregon, prohibiting any special law for laying, opening, and working highways, and for the assessment and collection of taxes for road purposes, and the city authorized by the charter to levy and collect taxes, etc., may demand from the county, road taxes collected on property within the city.—*City of Nyssa v. Malheur County*, 286.

STATUTES—TITLE—PLURALITY OF SUBJECTS.

9. Section 8906, B. & O. Comp., provides for examination by the board of pharmacy of applicants to determine their right to registration as pharmacists, and Section 3812 regulates the sale of poisons; both sections being parts of Act February 21, 1891 (Laws 1891, p. 157), entitled an Act "to regulate the practice of pharmacy and the sale of poisons in the State of Oregon." *Held*, that Act February 21, 1905 (Laws 1905, p. 222), entitled "An Act to amend Sections 3806, 3812, of Bellinger and Cotton's Annotated Oodes and Statutes of Oregon, and to provide for the licensing of itinerant vendors of all drugs, nostrums, ointments, and providing a penalty for violation thereof," did not violate Section 20, Article IV, Constitution of Oregon, requiring that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title.—*State v. Miller*, 381.

STATUTES—CONSTRUCTION.

10. All reasonable doubts must be resolved in favor of an act in determining whether it conflicts with the constitution.—*Straw v. Harris*, 424.

STATUTES—SUBJECTS AND TITLES OF ACTS—CONSTITUTIONAL REQUIREMENTS—EXPRESSION IN TITLE OF SUBJECT OF ACT—"PORT."

11. Act February 12, 1909, is entitled "An act to provide for incorporation under general law of ports in counties bordering on bays or rivers navigable from the sea." Laws 1909, p. 78. *Held* that, in view of legislation and decisions on the subject, the term "port" has a recognized status, and is used in its larger acceptation as comprising under one name a district of many places classed together for the purpose of revenue; and hence the title of the act is sufficient under Section 20, Article IV, Constitution of Oregon, providing that the subject of every act shall be expressed in its title.—*Straw v. Harris*, 424.

STATUTES—SPECIAL LAWS—CREATION OF CORPORATIONS—MUNICIPALITIES—"CORPORATION."

12. Section 2, Article XI, Constitution of Oregon, which, as first adopted, provided that corporations may be formed under general laws, but shall not be created by special laws except for municipal purposes, was amended June 4, 1906, to read: "Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws." *Held*, that such section, viewed in the light of the reference to "other corporations" in Section 9, providing that no county, city, town, or other municipal corporation shall become a stockholder in any corporation, etc., employed the word "corporation" in its broadest sense, including public, municipal, and private corporations; and hence a corporation for municipal purposes may not be created by special laws.—*Straw v. Harris*, 424.

STATUTES—"GENERAL LAW"—"SPECIAL LAW."

13. A "general law" within the meaning of Section 2, Article XI, Constitution of Oregon, as amended June 4, 1906, and providing that corporations may be formed under general laws, but shall not be created by special laws, is one by which all persons or localities complying with its provisions may be entitled to exercise powers, rights, and privileges conferred, while a "special law" is one conferring on certain individuals or citizens of a certain locality rights and powers or liabilities not granted to or imposed on others similarly situated.—*Straw v. Harris*, 424.

STATUTES—GENERAL AND SPECIAL LAWS.

14. Act February 12, 1909 (Laws 1909, p. 78), providing for the incorporation under general law of ports in counties bordering on bays or rivers navigable from the sea, is a general law within the provisions of Section 2, Article XI, Constitution of Oregon, as amended June 4, 1906, providing that corporations may be formed under general laws.—*Straw v. Harris*, 424.

STATUTES—SPECIAL LEGISLATION—CREATION OF CORPORATIONS—CONFERRING POWER ON COURTS.

15. Under Section 2, Article XI, Constitution of Oregon, as amended June 4, 1906, and providing that corporations may be formed under general laws, the legislature had power in passing act February 12, 1909 (Laws 1909, p. 78), providing for the incorporation under general law of ports in counties bordering on bays or rivers navigable from the sea, to delegate to the county court the power to declare the incorporation of a port.—*Straw v. Harris*, 434.

STATUTES—CONSTRUCTION—AMENDMENT.

16. An amendment is to be construed as if incorporated in the original act at the time enacted, and no clause is to be left inoperative.—*Zelly v. Blue Point Oyster Co.* 543.

STATUTES OF OREGON.

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STATUTES OF THE UNITED STATES.

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STREET RAILROADS.

Injuries From Construction and Maintenance of Street Railroad. See ELECTRICITY.

SUMMONS.

Same as PROCESS.

SUMPTER, CITY, CHARTER OF.

Naylor v. McColloch, Mayor, 305.

TAXATION.**TAXATION—SALE OF LAND FOR TAXES—EXHAUSTION OF PERSONALTY—DEFECTS INVALIDATING SALE.**

1. Failure of the sheriff to annex to his return of delinquent taxes on lands the affidavit that he can find no goods to satisfy the same, as required by Section 2811, Hill's Ann. Laws 1892, renders the sale and the deed based thereon void.—*Bradford v. Durham*, 1.

TAXATION—ASSESSMENT—DESIGNATION OF OWNER.

2. Land should be assessed to the holder of the apparent legal title, as required by Section 3057, B. & O. Comp., and an assessment to one not the owner is void.—*Bradford v. Durham*, 1.

TAXATION—ASSESSMENT—DESIGNATION OF OWNER.

3. An assessment of a tract of land at a lump sum to one who owns only a part of it is void.—*Bradford v. Durham*, 1.

TAXATION—TAX TITLES—TAX DEEDS—RECITALS—SUBSTANTIAL STATEMENT.

4. A tax deed based on an assessment to "Priscilla Durham," which recites that the land was assessed to "Petrucella Durham," is not a "substantial" statement of the assessment within the requirements of Section 3127, B. & O. Comp., defining the effect of tax deeds as evidence.—*Bradford v. Durham*, 1.

TAXATION—SALE FOR NONPAYMENT OF TAX—EVIDENCE AS TO VALIDITY.

5. One who claims as assignee of a certificate of a sale of property for nonpayment of taxes made to the county, and not by certificate or deed made to himself as a direct purchaser, has the burden of showing every requisite of a valid sale or of bringing himself within the provisions of some valid curative statute, and must prove advertisement for the period required by law.—*Rafferty v. Davis*, 77.

TAXATION—SALE FOR NONPAYMENT OF TAX—NOTICE OF SALE—PROOF OF PUBLICATION.

6. Under a statute requiring that the affidavit of publication of notice of sale for taxes shall be made by the printer, his foreman, or principal clerk, an affidavit by one who styled himself "Foreman of the Eastern Oregon Republican" is insufficient, where there is nothing to show that the person making the affidavit was the foreman of the printer, or what department of the work he was foreman of.—*Rafferty v. Davis*, 77.

TAXATION—SALE—NOTICE—PUBLICATION—PROOF.

7. Where the affidavit to prove publication of a notice of a tax sale is sworn to before a notary who fails to attach his official seal, the affidavit is worthless.—*Rafferty v. Davis*, 77.

TAXATION—SALE FOR NONPAYMENT OF TAX—PUBLICATION OF NOTICE—CURATIVE ACT.

8. There can be no valid sale of land for nonpayment of taxes where there is no valid advertisement of the sale, and it is not within the power of the legislature, by a curative act, to avoid such defect, and thereby take one person's property and give it to another.—*Rafferty v. Davis*, 77.

TAXATION—ACTION TO TRY TITLE—MEASURE OF DAMAGES—INJURIES TO PROPERTY—DETENTION FOR LOSS OR USE.

9. The measure of damages to a landowner on recovering possession from one who holds under a void tax title, is the rental value of the land as improved by the purchaser, deducting therefrom the reasonable market value of any permanent improvements placed on the land by the purchaser.—*Rafferty v. Davis*, 77.

TAXATION—SALES—REGULARITY—BURDEN OF PROOF.

10. The sale of property by a tax collector is an *in invitum* proceeding, the regularity of which must be established by the officer attempting to uphold a title pursuant to the sequestration.—*O'Sullivan v. Blakely*, 551.

TELEGRAPHS AND TELEPHONES.

Injuries Incident to Production and Use and Care Required. See ELECTRICITY.

TIME.

TIME—COMPUTATION—DAYS.

Except in special cases when otherwise provided, a prescribed period of days within which an act must be done is to be computed by excluding the first day and including the last.—*Rynearson v. Union County*, 181.

TRIAL.

TRIAL—REBUTTAL EVIDENCE—ADMISSIBILITY.

1. The state in a criminal prosecution held not entitled to prove on rebuttal admissions made by defendant without limiting the evidence to the purpose of impeachment.—*State v. Minnick*, 66.

TRIAL—INSTRUCTIONS—FORM OF INSTRUCTIONS.

2. Unless an instruction is so definite as to enable one of average intelligence to understand it, it ought to be refused as misleading, and a court ought not to give an instruction which, though stating the law correctly, is not couched in language sufficiently untechnical to be comprehended by the average juror.—*Russell v. Oregon R. & N. Co.* 123.

TRIAL—SPECIAL INTERROGATORIES—GENERAL VERDICT.

3. Where the jury fails to agree on an answer to an interrogatory, and returns a general verdict, the effect of the failure to agree is to eliminate from the case the matter embraced in the interrogatory, at least so far as it is sought to make it a substantive ground for recovery.—*Russell v. Oregon R. & N. Co.* 123.

TRIAL—SPECIAL INTERROGATORIES—GENERAL VERDICT.

4. Where several grounds of recovery are alleged, and an interrogatory submitted to the jury goes only to one of them, the general verdict returned by the jury will stand, notwithstanding their failure to agree on an answer to the interrogatory, as it will be presumed that the jury based their verdict on some other ground.—*Russell v. Oregon R. & N. Co.* 123.

TRIAL—SPECIAL INTERROGATORIES—GENERAL VERDICT.

5. Where the court decides to submit a special finding, it should hesitate to allow the jury to return its general verdict and ignore the finding, for it creates a doubt as to whether the jury agreed on the ground of recovery, and a good verdict must be based on a ground on which all the jurors agree.—*Russell v. Oregon R. & N. Co.* 123.

TRIAL—INSTRUCTIONS—WEIGHT OF EVIDENCE.

6. Under the statute providing that the jury are the sole judges of the value and effect of evidence, an instruction that the testimony of a witness that a thing actually occurred, is of more value than the testimony of a witness who says he did not see or hear the occurrence, is an invasion of the province of the jury.—*Russell v. Oregon R. & N. Co.* 123.

TRIAL—OBJECTIONS TO EVIDENCE—SUFFICIENCY.

7. The rule that objections to evidence must be specific does not apply, where the evidence is clearly inadmissible for any purpose, in which case a general objection is sufficient.—*Oregon R. & N. Co. v. Eastlack*, 196.

TRIAL—RECEPTION OF EVIDENCE—OBJECTIONS.

8. In condemnation proceedings, an objection to evidence of what plaintiff paid for other property for use in the same enterprise, on the ground that the evidence was not the measure of value, was sufficient to raise the question of the admissibility of such evidence, offered as substantive evidence, or on cross-examination as a test of an expert's knowledge of value.—*Oregon R. & N. Co. v. Eastlack*, 196.

TRIAL—INSTRUCTIONS IGNORING ISSUES.

9. The defendant, in an action on an express contract to pay rent, denied the contract, and alleged as a defense that a trustee in bankruptcy took possession of the premises under a decree against the plaintiff and leased them to defendant for a stipulated rental, which was the reasonable rental value of the premises, and paid into court the amount admitted to be due. Plaintiff's reply denied the new matter alleged in the answer, and averred that the decree had been reversed and the suit in which it was given dis-

missed. *Held*, that the issue made by the answer and reply was proper, and it was error to give an instruction that plaintiff's right to recover the reasonable rental value was not involved in the case.—*McGee v. Beckley*, 250.

TRIAL—EXCLUSION OF PUBLIC FROM TRIAL—PRESUMPTIONS AS TO ENFORCEMENT OF ORDER AND PREJUDICE FROM ERROR.

10. In the absence of a showing to the contrary, it is presumed that an order excluding the public from the courtroom during a criminal trial was enforced, and that it was prejudicial to the rights of the defendant.—*State v. Osborne*, 289.

TRIAL—EXCLUSION OF PUBLIC.

11. Under Section 11, Article I, Constitution of Oregon, declaring that, "in all criminal prosecutions the accused shall have the right to public trial," it was error for the court, in a prosecution for assault with intent to rape, to exclude from the courtroom all persons, except defendant, the attorneys engaged in the trial, the jury and officers of the court, and the witnesses while on the stand.—*State v. Osborne*, 289.

TRIAL—FINDINGS—SUFFICIENCY.

12. Where, in an action involving the construction of a contract, the court made the contract a part of its findings, and found in the terms of the contract what the parties agreed to do, a more specific finding would only be a conclusion of law from the facts found, and would be unnecessary.—*Naylor v. McColloch*, *Mayor*, 305.

TRIAL—FINDINGS—SUFFICIENCY.

13. Where the court found on issues ultimately determining the controversy and necessarily supporting the judgment, other issues became immaterial.—*Naylor v. McColloch*, *Mayor*, 305.

TRIAL—INSTRUCTIONS—REQUESTS—NECESSITY—ADDITIONAL INSTRUCTIONS.

14. In an action for commissions claimed to have been earned by purchasing land for defendant, an instruction that, if plaintiff exceeded his authority by making a larger first payment, or paying more per acre, than authorized, and defendant knew all the material facts in connection with plaintiff's acts, and accepted the benefits resulting therefrom, defendant by his conduct ratified plaintiff's unauthorized act, being the correct rule, if defendant desired an instruction as to what constituted the material facts as to plaintiff's acts in excess of his authority, he should have expressly called the court's attention to the omission.—*Mahon v. Rankin*, 328.

TRIAL—WAIVER OF IRREGULARITIES.

15. An order overruling a motion for a nonsuit will not be disturbed on appeal, when the omission, if any, is afterwards supplied by either party to the proceeding.—*Taylor v. Taylor*, 560.

TRIAL—RECEPTION OF EVIDENCE.

16. Where a part only of the judgment roll was material to an issue, the court did not err in refusing to admit the entire record.—*Taylor v. Taylor*, 560.

UNITED STATES STATUTES.

Considered in This Volume. See Table in Front of This Volume.

UNITED STATES CONSTITUTION.

Considered in This Volume. *State v. Osborne*, 289.

VALE, CITY CHARTER OF.

State ex rel. v. Malheur County Court, 255.

VENDOR AND PURCHASER.

VENDOR AND PURCHASER—CONTRACT—ACCEPTANCE—NECESSITY.

The acceptance of an offer to purchase realty, with the addition of an additional provision, amounted to a counter offer, and would not bind the purchaser until accepted by him.—*Flegel v. Dowling*, 40.

VENUE.

VENUE—TRANSITORY ACTIONS—CORPORATIONS.

1. Under Section 85, B. & C. Comp., a transitory action against a domestic corporation may be commenced in the county where it has its principal office, or in the county where the cause of action arose.—*Cunningham v. Klamath Lake R. Co.* 13.

VENUE—ACTIONS AGAINST FOREIGN CORPORATIONS.

2. In the absence of any statute, a foreign corporation doing business in Oregon held a resident thereof, so that service of process in an action against it may be made in the same manner as in the case of a domestic corporation.—*Cunningham v. Klamath Lake R. Co.* 13.

CORPORATIONS—ACTIONS—VENUE.

3. At common law, a corporation may be sued only in the sovereignty creating it.—*Cunningham v. Klamath Lake R. Co.* 13.

VENUE—ACTIONS—FOREIGN CORPORATIONS.

4. Under Laws 1908, p. 39, an action against a foreign corporation, for a personal injury negligently inflicted in another state, may be brought in the county in which its attorney resides.—*Cunningham v. Klamath Lake R. Co.* 13.

Presumption on Review as to Change of Venue in Justice Court. See APPEAL AND ERROR, 2.

VERDICT.

VERDICT—SPECIAL INTERROGATORIES—GENERAL VERDICT.

1. Where the jury fails to agree on an answer to an interrogatory, and returns a general verdict, the effect of the failure to agree is to eliminate from the case the matter embraced in the interrogatory.—*Russell v. Oregon R. & N. Co.* 128.

VERDICT—SPECIAL INTERROGATORIES—GENERAL VERDICT.

2. Where several grounds of recovery are alleged, and an interrogatory submitted to the jury goes only to one of them, the general verdict returned by the jury will stand, notwithstanding their failure to agree on an answer to the interrogatory.—*Russell v. Oregon R. & N. Co.* 128.

VERDICT—SPECIAL INTERROGATORIES—GENERAL VERDICT.

3. Where the court decides to submit to the jury a special finding, it should hesitate to allow the jury to return a general verdict and ignore the finding.—*Russell v. Oregon R. & N. Co.* 128.

WATERS.

WATERS—IRRIGATION—EVIDENCE—FINDINGS.

1. In a suit to enjoin defendant from interfering with the flow of water into complainant's irrigation ditch, evidence held to warrant a finding that defendant had unlawfully diverted the water from the main ditch, and that this was the cause of plaintiff's water shortage and the impairment of his crops.—*Simpson v. Harrah*, 448.

WATERS—IRRIGATION—RIGHTS TO WATER—PLEADING.

2. Where, in a suit to enjoin defendant from interfering with the flow of water in plaintiffs' ditch, defendant by answer made no claim to any water nor title to any land, and plaintiffs claimed no definite quantity of water, and did not prove the amount to which they were entitled, a decree attempting to establish plaintiffs' title to a definite amount of water, and to settle the rights of the parties as to the water flowing in the main ditch, was erroneous.—*Simpson v. Harrah*, 448.

WATERS—APPEAL AND ERROR—REHEARING—GROUND—MISTRIAL OF ISSUES.

3. Where the complaint alleged that defendant had been, during the season of 1907, and then was, wrongfully diverting water from the main ditch described, which the evidence showed, as well as that the water did not reach the division box, a contention made, as a ground for rehearing, that the controversy was not over the water which flowed into the main ditch, but over that at the division box, was untenable.—*Simpson v. Harrah*, 448.

WITNESSES.

WITNESSES—NEGATIVE AND POSITIVE EVIDENCE.

1. The comparative value of positive and negative testimony depends on the means of knowledge of the witnesses, their opportunity to know the facts and their apparent candor and demeanor on the witness stand.—*Russell v. Oregon R. & N. Co.* 128.

WITNESSES—WEIGHT OF EVIDENCE.

2. Under the statute providing that the jury are the sole judges of the evidence, an instruction that the testimony of a witness that a thing actually occurred, is of more value than the testimony of a witness who says he did not see or hear the occurrence, is an invasion of the province of the jury.—*Russell v. Oregon R. & N. Co.* 128.

WITNESSES—IMPEACHMENT—EVIDENCE.

3. After a witness has testified that the character of the prosecuting witness in a certain particular is bad, he will not be permitted on cross-examination to testify to specific acts or occupation of the prosecuting witness in rebuttal of such testimony.—*State v. Osborne*, 289.

WITNESSES—CROSS-EXAMINATION—BIAS.

4. Where witness for defendant, who was confined in jail when defendant was received, accused of killing deceased, testified to bruises and contusions on defendant's face and head when he first entered the jail, and that there was a hole or cut in defendant's hat, to corroborate defendant's theory that deceased had struck him on the head with a seal, and that the shooting was in self-defense, the State was properly allowed to ask the witness on cross-examination if he had not, in a conversation with a newspaper reporter, requested the reporter to visit deceased's office, and ascertain if there was a seal there, and, if so, to examine as to whether there was dust on it, etc., as tending to show bias.—*State v. Finch*, 482.

WORDS AND PHRASES.

"Action"—*Giant Powder Co. v. Oregon Western Ry. Co.* 325.

"Complaint"—*Giant Powder Co. v. Oregon Western Ry. Co.* 325.

"Corporation"—*Straw v. Harris*, 424.

"Deliberate"—*State v. Jancigaj*, 861.

"En Ventre Sa Mere"—*State v. Atwood*, 526.

"Easement"—*German Savings & Loan Society v. Morgan*, 147.

"Etc."—*Naylor v. McColloch, Mayor*, 805.

"Final Decree"—*Kesler v. Nice*, 585.

"General Appearance"—*Multnomah Lumber Co. v. Weston Basket Co.* 22.

"General Law"—*Straw v. Harris*, 424.

"In Case of the Death of Such Child"—*State v. Atwood*, 526.

"Itinerant Vender"—*State v. Miller*, 381.

"Judicial Business"—*Ferrari v. Beaver Hill Coal Co.* 210.

"Legal Voters"—*Roesch v. Henry*, 280.

"Ordain"—*Haines v. City of Forest Grove*, 448.

"Port"—*Straw v. Harris*, 424.

"Posthumous Child"—*State v. Atwood*, 526.

"Pregnant With Child"—*State v. Atwood*, 526.

"Presumption"—*State v. Parr*, 316.

"Property Growing Out of Marriage Relation"—*Taylor v. Taylor*, 560.

"Registered Voters"—*Roesch v. Henry*, 280.

"Reprieve"—*State v. Finch*, 482.

"Respondent Superior"—*Fetting v. Winch*, 600.

"Secured Claim"—*Bowman v. Wade*, 347.

"Special Appearance"—*Multnomah Lumber Co. v. Weston Basket Co.* 22.

"Special Law"—*Straw v. Harris*, 424.

"Substantial"—*Bradford v. Durham*, 1.

"Suit"—*Giant Powder Co. v. Oregon Western Ry. Co.* 325.

WRIT OF REVIEW.**WRIT OF REVIEW—SUFFICIENCY OF PETITION.**

1. A petition for a writ of review *held*, under Sections 596, 597, B. & C. Comp., sufficient to notify the court and defendant of the precise inquiry intended to be raised.—*White v. Brown*, 7.

WRIT OF REVIEW—MOTION TO OPEN JUDGMENT.

2. Denial of a motion to open a judgment on a writ of review so as to require a more complete return to the writ *held* not reviewable except in case of manifest abuse of discretion.—*White v. Brown*, 7.

WRIT OF REVIEW—ASSIGNMENT OF ERRORS—NATURE AND PURPOSE.

3. The statutory demand that errors relied on to set aside or correct the proceedings of an inferior tribunal must be assigned in the petition, for the writ is to advise the court and the adverse party of the particular questions to be considered in determining the merits of the controversy.—*White v. Brown*, 7.

WRIT OF REVIEW—INTERESTED PARTY—RECORD.

4. Writ of review to revise the action of the county court in making an order of prohibition following an election is properly dismissed; neither the petition nor the writ showing that petitioner appeared in the county court to oppose the order, and so not disclosing that he was an interested party.—*Garrison v. Malheur County Court*, 289.

WRIT OF REVIEW—DEFECT OF PARTIES—WAIVER.

5. Respondents, by making full return to the writ, without interposing any motion to quash or any demurrer on account of defect of parties, will not be held to have waived, and so to be precluded from raising the objection that the petitioner for writ of review was not shown to be an interested party, the statute making no provision for demurrer or motion to quash, but the inferior court having no alternative, when the writ issues, but to send up its return, whereof the hearing is on inspection of the writ and the return.—*Garrison v. Malheur County Court*, 289.

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